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IN ABSENTIA WAR CRIMES TRIALS:
A JUST MEANS TO ENFORCE INTERNATIONAL HUMAN RIGHTS?

*A Thesis
Presented to
The Judge Advocate General's School
United States Army*

Captain Jody M. Prescott

The opinions and conclusions that the author has expressed in this manuscript do not represent the views of The Judge Advocate General's School, the Judge Advocate General's Corps, the United States Army, or any other government agency.

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**IN ABSENTIA WAR CRIMES TRIALS:
A JUST MEANS TO ENFORCE INTERNATIONAL HUMAN RIGHTS?**

Captain Jody M. Prescott

Abstract: The United Nations has created an International Tribunal to adjudicate cases of alleged war crimes arising out of the dissolution of the Former Yugoslavia. Under its authorizing statute and rules of procedure, the International Tribunal cannot try suspected war criminals in absentia. This thesis argues that a modified civil-law style default trial procedure, in which the absent accused is represented by appointed counsel at a complete hearing but still has the right to a new trial de novo, would be more effective in compelling absent accused to come before the International Tribunal than its hybrid trial process.

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**IN ABSENTIA WAR CRIMES TRIALS: A JUST MEANS TO ENFORCE
INTERNATIONAL HUMAN RIGHTS?**

I. Introduction

A. Background

For the first time in almost fifty years, an international war crimes tribunal has convened. On November 17, 1993, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia [hereinafter International Tribunal] opened at the Hague.¹ Although the scope of its jurisdiction is limited to acts which occurred in the Former Yugoslavia after January 1, 1992,² the ferocity of the fighting which has raged since the dissolution of Yugoslavia that year has resulted in a potential caseload in the thousands.³

In October 1990, ethnic tensions and economic recession in Yugoslavia prompted the federal republics of Slovenia and Croatia to seek greater autonomy from the Serb-dominated central government in Belgrade.⁴ Croatia contained a significant number of Serb enclaves, and the Serbs in these areas were fearful of Croatian dominance and isolation from their fellow Serbs in the rest of Yugoslavia.⁵ Armed Serbian groups began skirmishing with Croatian security forces in 1990, and tensions heightened as illegally imported arms began flowing into the region.⁶ Finally, in March 1991, several of the Serbian enclaves declared their independence from Croatia.⁷ In April 1991, these enclaves declared themselves part of Serbia.⁸

On June 25, 1991, the republics of Slovenia and Croatia declared their independence from Yugoslavia.⁹ The predominantly Serbian and Montenegrin-officered¹⁰ Yugoslavian National Army [hereinafter JNA] tried to retain control over the breakaway republics.¹¹ This resulted in sharp fighting between the JNA and the republican forces.¹² In Croatia, the JNA was joined in its efforts by Serbian militia units.¹³ War crimes allegations were made by all sides in the conflict, but particularly against the Serb irregulars who had joined in the fighting.¹⁴ JNA forces left Slovenia in July, 1991, but did not withdraw from Croatia until after the United Nations [hereinafter U.N.] arranged a cease fire in January 1992.¹⁵ On February 29, 1992, the republic of Bosnia-Herzegovina declared its independence from Yugoslavia.¹⁶ In response, Bosnian Serbs declared their own independent state, and fighting broke out between the Bosnian Serbs and the Bosnian Croats and Muslims soon thereafter.¹⁷ The warring factions in Bosnia-Herzegovina began making complaints to the U.N. forces commander in that republic about atrocities in concentration camps in the early spring of 1992.¹⁸ In particular, reports of widespread atrocities by Serb forces against Croat and Muslim civilians became commonplace by the late summer of 1992.¹⁹

Human rights groups monitoring the situation in Bosnia-Herzegovina were among the first to call for international judicial action against those responsible for the atrocities in

the newly independent republic.²⁰ At an international peace conference on Yugoslavia in late August 1992, all the parties agreed that an international war crimes tribunal should be established as part of a peace settlement for the area.²¹ On December 18, 1992, the U.N. General Assembly passed a non-binding resolution urging the U.N. Security Council to take certain measures to aid in reestablishing peace in Yugoslavia, including establishing a war crimes tribunal.²²

The issue proved to be very controversial,²³ for certain countries involved in the negotiations between the warring factions believed that war crimes trials would frustrate achieving a peaceful settlement in the area.²⁴ Those nations with peacekeeping forces already in Bosnia-Herzegovina, including Britain and France, feared trials would endanger their troops.²⁵ Eventually, after less drastic measures failed to bring peace to the region or to curtail the continuing atrocities,²⁶ on February 22, 1993 the U.N. Security Council authorized U.N. Secretary-General Boutros Boutros-Ghali to prepare a plan for an international war crimes tribunal for its consideration.²⁷ The Security Council unanimously approved Secretary-General Boutros-Ghali's proposed Statute for the International Tribunal on May 25, 1993.²⁸

B. International Tribunal: Structure and Jurisdiction

Under the Statute, the International Tribunal has the power to try "persons responsible for serious violations of international humanitarian law committed in the territory of the

Former Yugoslavia since 1991."²⁹ "Serious violations" include grave breaches of common Article 2 of the 1949 Geneva Conventions,³⁰ violations of the laws or customs of war,³¹ genocide,³² and crimes against humanity.³³ The International Tribunal is composed of eleven judges, who are divided into two three-member trial chambers and one five member appeal chamber.³⁴

The trial process begins when the Prosecutor conducts trial official investigations into allegations of offenses.³⁵ If the Prosecutor determines that a prima facie case exists, he drafts an "indictment containing a concise statement of the facts and the [] crimes with which the accused is charged" and submits it to a Trial Chamber judge for review.³⁶ The reviewing judge dismisses the indictment unless he confirms that a prima facie case is established.³⁷ Once the indictment is confirmed, the case is set for trial before a trial chamber of the International Tribunal.³⁸

After the Trial Chamber announces judgment, errors of law and "error[s] of fact which ha[ve] occasioned a miscarriage of justice may be raised before the Appeal Chamber."³⁹ The Appeal Chamber may "affirm, reverse, or revise the decisions taken by the Trial Chambers."⁴⁰ A defendant or the Prosecutor may apply to the International Tribunal for review of either a Trial Chamber or an Appeal Chamber judgment on the basis of newly discovered evidence, if such evidence "could have been a decisive factor in reaching a decision."⁴¹

C. International Tribunal: Rights of the Accused

Among the rights afforded an accused at trial before the International Tribunal are the following:

1. To be immediately informed of the "nature and cause of the charge" in detail and in a language the defendant understands;
2. To have equal status with all persons before the Tribunal;
3. To a fair and public hearing;
4. To be presumed innocent until proven guilty;
5. To be tried expeditiously;
6. To examine the prosecution witnesses, and to obtain the presence and testimony of defense witnesses;
7. To have an interpreter, free of charge, if the defendant does not understand the language used in the tribunal; and
8. To remain silent during the proceedings.⁴²

Most importantly, at least for purposes of this thesis, the Statute requires that an accused be present before the International Tribunal can try him.⁴³

D. International Tribunal: Origin of Personal Jurisdiction

To better appreciate the personal jurisdiction of the International Tribunal, it is worthwhile to review briefly the negotiations and planning that led up to the statutory requirement of personal presence of the accused. By the early winter of 1993, France appeared to have reversed its position on the desirability of war crimes trials. In January, 1993, French Foreign Minister Roland Dumas appointed eight legal experts to a

panel to make recommendations to the French government on forming an international tribunal to prosecute war crimes in the Former Yugoslavia.⁴⁴

On the basis of this panel's recommendations, France submitted a proposal for a war crimes tribunal to the Security Council that included provisions for trying defendants in their absence if they refused to attend trial.⁴⁵ The report noted that

[t]he committee does not exclude the possibility of taking proceedings against defendants in their absence -- a solution clearly dictated by realism. The details of the proceedings would have to be laid down in the Tribunal's rules, which should indicate that, since the trial is being conducted in the absence of the defendant, he cannot be represented by counsel and no one can put questions to witnesses and experts on his behalf.⁴⁶

As under French criminal procedure, the panel believed that the judgment should be annulled if the defendant was arrested or surrendered.⁴⁷ If the trial was in progress when the defendant became present, for any reason, than the trial should be discontinued and the case referred back to the Commission for Investigation and Prosecution for further proceedings.⁴⁸ The panel also believed that "judgment in the defendant's absence must be a last resort, and every effort must be made to ensure that the defendant effectively appears, so that the judgment cannot be challenged and the trial is of an exemplary nature."⁴⁹

In late March 1993, while the Security Council awaited the report of the Secretary-General on establishing a war crimes tribunal, Canada submitted the report of a panel of international

criminal law experts which it had convened to study the war crimes tribunal question.⁵⁰ With regard to trial procedure, the report noted "[t]he threshold issue to be decided is whether and in what circumstances the tribunal or court may undertake proceedings in the absence of the defendant."⁵¹ Views on this issue were divided, the report noted, for some participants

believed that trials in absentia could be legally acceptable in certain clearly defined cases in which the rights of the accused were protected (including by certain criminal procedural rules, pre-trial investigation, warrant of arrest, indictment, etc.) and provided that the accused could be tried de novo with full rights if that person reappeared or surrendered.⁵²

A majority of the experts, however, found in absentia trials would "undermine the legitimacy of the tribunal or court and could have the undesirable effect of inhibiting states from becoming parties to the statute of the court."⁵³ Even if such a procedure included the possibility of a new trial de novo, many of the experts "doubted whether a trial de novo could be fair and whether it would respect the right to the presumption of innocence."⁵⁴

These reports and others were considered by the Secretariat in drafting the Statute.⁵⁵ The draft Statute which Secretary-General Boutros-Ghali submitted to the Security Council gave the defendant the right

to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he

does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it . . .⁵⁶

During the drafting of the International Tribunal's code of procedure, attempts were made to take "the French concept to its limits, which [would] allow[] [the court] to establish a procedure which, while not judging the accused in absentia, [would] allow [the court] to make public the charge against [the accused]."⁵⁷ Under the procedural code, evidence against the absent accused will be presented at public hearings, and verbatim transcripts of the proceedings will then be given to the U.N. Security Council and the "country believed to be sheltering the accused."⁵⁸ This hybrid procedure is still not an in absentia trial as contemplated in the French Report.⁵⁹

E. The Issue: Efficacy of the Exercise of Personal Jurisdiction under the Statute

Like the International Military Tribunal [hereinafter IMT] which was convened at Nürnberg by the victorious Allies after World War II,⁶⁰ the present International Tribunal is a temporary body, intended solely to adjudicate alleged war crimes arising from a particular conflict.⁶¹ Unlike the IMT, however, the International Tribunal faces serious obstacles in obtaining personal jurisdiction over accused war criminals. While most significant Nazi political and military leaders were in Allied custody by the time the IMT began the trials on November 20,

1945,⁶² many of the suspected war criminals in the Yugoslavian conflicts are believed to be at large in areas controlled by the various factions or in the rump Yugoslavia itself.⁶³ Further, the IMT Charter allowed defendants to be tried in absentia,⁶⁴ a power which is unavailable to the International Tribunal.⁶⁵

Political leaders in the Serbian controlled areas of Bosnia-Herzegovina have stated that they will not turn over suspected war criminals to the International Tribunal,⁶⁶ and the Yugoslavian Minister of Justice, Zoran Stojanovic, has stated that Yugoslavia will try suspected war criminals in its territory itself.⁶⁷ Although the Statute requires all states to transfer accused persons to the International Tribunal upon the issue of an appropriate order⁶⁸, enforcement measures for contempt of such orders would likely consist of sanctions against the refusing states.⁶⁹ Similar sanctions have proved ineffective in resolving the ethnic conflicts in the former Yugoslavia.⁷⁰ The lack of in absentia trial power and the truculence of Serb leaders have caused many to openly doubt the efficacy of any war crimes trials the International Tribunal might conduct.⁷¹

Although the efficacy of the International Tribunal is presently undetermined, an official of the current United States [hereinafter U.S.] administration has already suggested that it should serve as a model for future U.N. tribunals to deal with other conflicts.⁷² Proponents of the International Tribunal emphasize its procedural safeguards for defendants, and argue that only through securing the defendants' actual presence at

trial can its verdicts be seen as the results of fair trials.⁷³

This thesis assumes that the creation of the International Tribunal evidences the determination of the international community that war crimes trials will positively affect the enforcement of international human rights in a positive fashion. The question now is what sort of trial procedure will most effectively assist the International Tribunal in meeting this goal. To this end, this thesis will first examine the concept of personal jurisdiction as it developed in the two great Western law systems, the common law and the civil law. Actually obtaining jurisdiction over accuseds has been a problem for courts since ancient times. Understanding how the common law and the civil law have each dealt with this problem will allow an appreciation of both the significance of the right of presence in each system and the policy interests which have impacted upon the right over time.

Second, this thesis will examine the historical record of in absentia war crimes trials since World War I. This review will develop empirically based conclusions as to the benefits and the disadvantages of in absentia trial processes in the context of war crimes trials. By viewing this information against the backdrop of internationally accepted standards of due process, this thesis will identify the characteristics of a hypothetical in absentia trial procedure that meets these standards.

This thesis argues that a civil-law style default procedure, in which a defendant is represented by counsel in a complete

hearing of the case and still has the right to a new trial de novo upon his appearance in court will meet the internationally accepted standards of due process in criminal trials. Because of the increased reliability of the evidence presented at such hearings compared to ordinary civil-law default trials, the verdicts and sentences resulting from such trials are more deserving than those handed down under ordinary civil-law default style hearings of international approval. These verdicts and sentences are perhaps more likely to persuade nations harboring alleged war criminals to surrender them to the International Tribunal for a new trial de novo than the hybrid process set out in the International Tribunal's rules of procedure.

II. The Right of Presence: Historical Development of the English Common Law Rule

In Anglo-Saxon trial, civil or criminal, was essentially the settling of a private matter between parties in the feudal lord's court.⁷⁴ Accordingly, the court had jurisdiction only over those parties who consented to the court's settling of the dispute.⁷⁵ Over time, because courts could not try recalcitrant defendants in their absence, the courts adopted the practice of outlawry to compel defendants to accept the courts' jurisdiction.⁷⁶

Outlawry was originally "a declaration of war by the commonwealth against an offending member."⁷⁷ Before an absent defendant could be outlawed by an Anglo-Saxon court, he first had to be "exacted," that is, ordered by the court to appear, before five successive county court sessions.⁷⁸ Failure to appear at

the last court caused one to be declared an outlaw.⁷⁹ Although spared a trial in absentia, the outlaw was considered outside the "King's peace and protection," and therefore could be killed by anyone.⁸⁰ Further, the outlaw's personal and real property were confiscated.⁸¹

By the thirteenth century, outlawry had become primarily a means to coerce contumacious defendants to accept the jurisdiction of the courts.⁸² Outlawry was not abolished in civil actions until 1879;⁸³ although the rule that both parties must be present in civil cases was abolished in 1832.⁸⁴ Courts infrequently resorted to outlawry in criminal actions by the early nineteenth century, but its use was still technically possible as late as the 1880's.⁸⁵ Although it was surprisingly long-lived, outlawry never evolved into anything more than a means to coerce the recalcitrant defendant into court. Likewise, one other aspect of English law has remained since Anglo-Saxon times: Felons must appear before the court before jurisdiction exists to try their cases.⁸⁶ This right may be waived by misbehavior in court,⁸⁷ or by absconding from the jurisdiction.⁸⁸ However, a felon tried in absentia must still be present to be sentenced.⁸⁹

III. Subsequent Development of the Common Law Rule In the United States

A. *Civilian Law*

In the American states, the English common law rule of right of presence was overwhelmingly adopted in the case law and

statutory law, and was often explicitly stated in the various state constitutions.⁹⁰ Surprisingly, the device of outlawry found a toehold in the newly independent states, and was used in Pennsylvania at least until the formation of the U.S. under the federal constitution.⁹¹ Many state courts took a functional approach to the issue, and looked to see whether the defendant was prejudiced in some fashion before awarding relief.⁹² Various courts also reaffirmed the English rule that an accused's voluntary absence from the court after arraignment did not divest the court of jurisdiction, for the defendant was seen as voluntarily waiving the constitutional and statutory right to presence.⁹³ Under such circumstances, courts could try and convict the absent accused using the ordinary procedure.⁹⁴

Under the U.S. Constitution, defendants in federal courts are entitled to due process of law under the Fifth Amendment, and to the assistance of counsel, the right of confrontation, and the right to a speedy and public trial under the Sixth Amendment. Since the Fourteenth Amendment was enacted, these minimum rights have been available to defendants in state courts, if they were not already available by operation of state law. In *Hopt v. Utah*,⁹⁵ the first U.S. Supreme Court case on the defendant's right of presence, the Court found a denial of due process when a defendant was not present at the examination of prospective jurors who had been challenged for cause.⁹⁶ The Utah Criminal Code of Procedure required the personal presence at trial of one accused of a felony.⁹⁷ The Court disregarded the appellant's

lack of objection, holding that the appellant could not waive what the statute required.⁹⁸ The Court defined the scope of the right of presence as existing "at every stage of the trial when [the defendant's] substantial rights may be affected by the proceedings against him."⁹⁹

The Court had an opportunity to construe a statute which allowed for the defendant's absence under certain circumstances in *Diaz v. United States*.¹⁰⁰ The appellant in *Diaz* was present throughout much of the trial, and consented to the trial proceeding in his absence at certain times.¹⁰¹ The applicable Philippine statutes entitled the defendant to be present at each stage of the trial, but only required the felony defendant's presence at arraignment and when judgment was announced.¹⁰²

Despite the importance of the right of presence in American jurisprudence, the Court recognized the common law rule that a defendant's voluntary absence from court once the trial began operated as a waiver of this right, and allowed the trial to continue as if the defendant were absent.¹⁰³ The statutory scheme did not require the appellant's presence during the times that appellant had requested and been allowed to be absent from court, and the judgment was therefore affirmed.¹⁰⁴

The functional analysis set forth in *Hopt* was revisited by the Court in *Snyder v. Massachusetts*,¹⁰⁵ perhaps the Court's most significant decision on the right to presence. In *Snyder*, the appellant challenged the trial judge's refusal to allow him to be present at a view of the crime scene as a violation of the due

process of law guaranteed under the Fourteenth Amendment.¹⁰⁶ Writing for the majority, Justice Cardozo was careful to distinguish between the common law right of presence and the constitutional sources of the right, for only the latter were applicable to the states under the Fourteenth Amendment.¹⁰⁷

Justice Cardozo assumed as an initial matter "that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."¹⁰⁸ Accordingly, the constitutional right of presence was limited to "the privilege to confront one's accusers and cross-examine them face to face" and the due process interest in the defendant being able to assist in his defense.¹⁰⁹ In this context, Justice Cardozo found "the presence of a defendant [to be] a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."¹¹⁰ Because the appellant was not prejudiced by the view, there was no due process violation, and the judgment was affirmed.¹¹¹

In his dissent, Justice Roberts found Cardozo's delineation of the due process interests served by the right of presence too restrictive. Roberts believed that the intent of the Fourteenth Amendment was not to guarantee just results at trial, "but that the result, whatever it be, shall be reached in a fair way."¹¹² Having the defendant aware of everything that happened before the court that was deciding his fate also served due process

interests, particularly since the overwhelming majority of states protected the right of presence at all stages of the trial either in constitutions, statutes or case law.¹¹³

Although it is styled as a confrontation clause case, the U.S. Supreme Court's decision in *Illinois v. Allen*,¹¹⁴ is the latest significant case dealing with the right to presence in a general sense. At the trial level in *Allen*, respondent was removed from the courtroom for several periods of time because of his extremely disruptive behavior.¹¹⁵ The respondent was represented by counsel during these absences.¹¹⁶ After the Illinois Supreme Court affirmed his conviction, the respondent filed a petition for a writ of habeas corpus in federal district court, arguing that the trial judge's actions had denied him the right of confrontation.¹¹⁷ The district court did not issue the writ.¹¹⁸ The Seventh Circuit Court of Appeals reversed the district court, "holding that a defendant's right to attend his own trial was so 'absolute' that, regardless of how unruly his conduct, he could never be held to have lost that right so long as he insisted on it [.]"¹¹⁹

Writing for the majority, Justice Black noted that "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."¹²⁰ Despite the importance of this right, it was not absolute; for example, it could be lost by consent or misconduct.¹²¹ The interest in the "proper administration of criminal justice" served by the orderly

demeanor of court proceedings outweighed the right of a disruptive defendant to remain in the court room.¹²² The decision of the Seventh Circuit Court of Appeals was reversed.¹²³

In 1946, the defendant's right to presence at trial was codified in Federal Rule of Criminal Procedure [hereinafter Fed. R. Crim. P.] 43.¹²⁴ As promulgated, Fed. R. Crim. P. 43 was intended to reflect the current law on the right of presence,¹²⁵ including the common law right as well the constitutional aspects of the right to presence.¹²⁶ Fed. R. Crim. P. 43 was amended in 1975 to reflect the decision in *Allen*,¹²⁷ and currently reads as follows in pertinent part:

(a) **Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) **Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.¹²⁸

Despite this broad codification of the right to presence, many federal courts continue to rely upon Justice Cardozo's test

in *Snyder* to determine the scope of the right.¹²⁹

B. Military Law

It is a long-standing rule in American military jurisprudence that the voluntary absence of the accused after arraignment does not divest a court-martial or military commission of jurisdiction over the case, and that the trial may proceed against the accused in absentia up to and including sentencing.¹³⁰ One of the earliest reported cases of an American military trial in absentia occurred in 1864.¹³¹ In that case, one of the defendants being tried before a military commission in Indiana escaped during trial. The trial continued and the absent defendant was sentenced to death. The findings and sentence were subsequently approved by the reviewing authority.¹³²

Nearly ninety years later, in the case of *United States v. Houghtaling*, the United States Court of Military Appeals found the in absentia trial of an escaped defendant after arraignment in a capital rape case consistent with "fundamental concepts of justice and essential fairness" and not violative of the Sixth Amendment.¹³³ The court noted that although the applicable version of Fed. R. Crim. P. 43 allowed trial in absentia only in non-capital cases,¹³⁴ this limitation had not historically applied to in absentia trials before courts-martial.¹³⁵ Further, since the current Manual for Courts-Martial had been promulgated subsequent to the promulgation of the federal rules, and such a provision was absent, the intent of the drafters must have been to exclude it.¹³⁶

The court found the federal distinction between capital and non-capital offenses illogical. The court noted that it rewarded those accused of the most serious crimes by delaying their trials indefinitely through the commission of further criminal acts, while those accused of less serious crimes ran the risk of trial in absentia.¹³⁷ Further, the court observed that limiting in absentia trials to non-capital cases would increase the chances of one accused of a capital offense in the military justice system avoid trial altogether.¹³⁸ Given the mobility and dispersion of potential witnesses, as well as the possibility of harm to those in combat environments, such a limitation could cause the loss of evidence to the point where a trial could not even be held.¹³⁹ The court also justified the ability of courts-martial to proceed to sentencing against an absent accused on grounds of necessity.¹⁴⁰ Unlike civilian trials, in which there may be a different judge for sentencing, "it [would] always be difficult, and usually impossible, ever to reassemble a court-martial -- and the longer the delay, the greater the difficulty and threat of impossibility."¹⁴¹

C. Summary

American military law with regard to in absentia trials has changed insignificantly since *Houghtaling*,¹⁴² and Fed. R. Crim. P. 43 was changed in 1975 in part to eliminate the distinction between capital and non-capital trials in absentia.¹⁴³ The second rationale behind the *Houghtaling* court's decision, the need to preserve testimony and the availability of witnesses, is

particularly applicable to the question of whether to conduct in absentia war crimes trials. Although the absent defendant must have been arraigned before the case may be tried in absentia in either the federal civilian or military justice systems, from a functional viewpoint the trial is conducted as if he had not appeared before the tribunal at all. The defendant is not there to assist in the cross-examination of prosecution witnesses, nor can he assist in the preparation of the defense case.

Arguably, the fairness aspect of the right to presence is vitiated by the defendant's willful misconduct in avoiding the judgment of the court. In light of the statutory law and case law on the right of presence, one can only conclude that the federal legal systems place a higher value upon the efficient and effective functioning of the judicial systems than upon the margin of increased reliability of the evidence before the court engendered by the defendant's presence. Such a policy decision implies overall judicial satisfaction with the reliability of the prosecution evidence that comes before the courts, as well as the degree to which due process requirements are met even in the defendant's absence.

IV. Trial in the Defendant's Absence: Development of the French Civil Law Rule

A. Civilian Law

1. Historical Development

As in Anglo-Saxon England, the right to bring an action before a court in early medieval France belonged to the aggrieved

parties, and not the feudal lord.¹⁴⁴ Likewise, feudal French courts also made use of outlawry as a means to compel recalcitrant defendants to accept the jurisdiction of the courts.¹⁴⁵ The various French outlawry procedures were similar to those used in England at that time. For example, under the procedure applicable in Normandy, the defendant first had to be summoned to three successive assizes.¹⁴⁶ Failure to appear by the third court session resulted in notification to the defendant's kin to produce him at a later specified date.¹⁴⁷ Failure to appear before the court within forty days of the specified day resulted in the absent accused being pronounced an outlaw.¹⁴⁸

By the thirteenth century, however, resistance to the jurisdiction of the courts was seen not merely as recalcitrance, but as a form of confession of guilt.¹⁴⁹ Increasingly, the "outlaw was looked upon as 'attainted and convicted' of the crime."¹⁵⁰ Concurrently, the declaration of outlawry also began to lose its final nature; it could be revoked by royal act or collateral judicial action.¹⁵¹ The thirteenth century also saw increasing reliance by the French courts upon an inquisitorial style proceeding, brought by an official prosecutor, rather than the traditional accusatory style proceeding.¹⁵² In the inquisitorial style proceeding, emphasis is placed upon written evidence rather than in-court testimony.¹⁵³ Together, the increased judicial significance of outlawry, the use of the inquisitorial style proceeding, the influence of Church law, and the growth of the absolute monarchy encouraged the evolution of

the outlawry procedure into an in absentia trial process over time.¹⁵⁴

Changes in the outlawry procedure during the fifteenth and sixteenth centuries further magnified the effect of its pronouncement. The charges against the accused were actually proved before the pronouncement was made, and pronouncement became equivalent to a real sentence.¹⁵⁵ Further, by the sixteenth century, the king's procurator occupied a central role in the administration of justice, and had in fact become the real accuser in cases before the courts.¹⁵⁶ Accordingly, the public interest in punishment outweighed the private concerns of the parties involved.¹⁵⁷

The Ordinance of 1670, promulgated during the reign of Louis XIV, simplified the contumacy procedure while retaining most of its essential features.¹⁵⁸ Detailed study of the Ordinance's contumacy procedure is worthwhile, for it served as a model for the current French trial procedure in the absence of the accused.¹⁵⁹ Under the Ordinance of 1670, a search was first made for an absent defendant.¹⁶⁰ If the defendant could not be found, his property was then inventoried.¹⁶¹ The defendant was then twice summoned by public proclamation, and if he still did not appear within the allotted time period, the prosecutor could move to have the case tried under the contumacy procedure.¹⁶² The court would then order the confirmation of the witnesses.¹⁶³ This order by the court was deemed equivalent to the exercise of the defendant's right of confrontation,¹⁶⁴ and it also declared the

accused properly examined, convicted, and sentenced.¹⁶⁵

Felons convicted of capital offenses in absentia were constructively notified of the judgment against them by being executed in effigy, while those sentenced to lesser punishments were deemed to receive notice of the judgment through public posting of the decision or service of the decision at their residences.¹⁶⁶ These procedures were significant, for even though the judgment became a nullity once an accused appeared before the court, the effects of the judgment became less revocable as more time elapsed.¹⁶⁷ For example, if the accused appeared within one year of the judgment, he would retain the right to any accrued profits on personal property and the proceeds from the sale of his movables.¹⁶⁸ If more than five years elapsed, however, the confiscation of the property and any adjudged fines were considered the results of a final judgment, and were therefore irrevocable.¹⁶⁹

If the accused appeared, a new trial was held.¹⁷⁰ The accused was confronted, in the civil law sense, with those witnesses who were still available.¹⁷¹ The depositions of unavailable witnesses were admissible against the accused.¹⁷² Objections to such depositions could only be based on relevant documentary evidence, however, rather than verbal testimony.¹⁷³

After the Revolution of 1789, extensive legal reforms incorporated many aspects of English trial procedure into the French trial procedure.¹⁷⁴ The procedure in contumacy, however, remained essentially the same throughout the turbulent years

following the Revolution.¹⁷⁵ When dissatisfaction with the new forms of criminal procedure led to the promulgation of the more civil law oriented Code of Criminal Examination in 1808,¹⁷⁶ the procedure found in the Ordinance of 1670 apparently served as the model.¹⁷⁷

2. Current Practice

The current contumacy procedure under the Code of Criminal Procedure is essentially unchanged from that under the Code of Criminal Examination of 1808.¹⁷⁸ To properly appreciate the procedure, a brief overview of the French criminal justice system is necessary. All felonies are tried in the highest court of first instance, the Assize Court.¹⁷⁹

The felony trial process begins with a judicial investigation conducted by an examining magistrate.¹⁸⁰ The purpose of the judicial investigation is to determine whether the facts of a case constitute a felony.¹⁸¹ The examining magistrate's decision to recommend felony charges in a case is reviewed by a three judge Indicting Chamber.¹⁸² If the Indicting Chamber finds sufficient facts to constitute a felony, it issues an indictment to the Assize Court.¹⁸³ The Assize Court consists of three learned judges, the "court proper," and nine lay judges.¹⁸⁴ The court as a whole decides both guilt and sentence.¹⁸⁵ At least eight of the twelve members must find the defendant guilty before a finding of guilty results.¹⁸⁶

A complete trial in absentia only occurs in the Assize Court¹⁸⁷ when an accused who is already in custody refuses to

enter the courtroom,¹⁸⁸ has escaped, or is expelled for unruly behavior.¹⁸⁹ Under these circumstances, the trial is "deemed to be adversary," that is, binding upon the defendant as if he were present.¹⁹⁰ If an accused simply fails to appear before the Assize Court after having been properly served notice, however, he is given another ten days to appear before the court.¹⁹¹ If the accused remains absent after that time, the case is decided by the court proper on the basis of the official file, which contains the results of all pretrial investigations.¹⁹² At this truncated proceeding, counsel for the defense are not heard,¹⁹³ and extenuating circumstances are not considered.¹⁹⁴

If convicted, the defaulted accused is sentenced, his belongings are impounded,¹⁹⁵ and his civil rights are suspended.¹⁹⁶ If the accused is arrested or appears before the statute of limitations has elapsed on the adjudged punishment,¹⁹⁷ the default judgment falls and the accused is retried under the ordinary procedure.¹⁹⁸ At the retrial, the depositions of unavailable witnesses and the written statements of coaccuseds are admissible into evidence, as well as "other evidence that is judged by the president [of the court] to be useful to the manifestation of the truth."¹⁹⁹

B. Military Law

The default procedure currently used in French courts-martial is similar to the civilian procedure.²⁰⁰ When an accused fails to appear before a military court, the President of the court-martial issues an order setting out the particulars of the

charge and gives the accused an additional ten days to appear before the court.²⁰¹ If the accused fails to appear after this ten-day period, the trial may be conducted in the defendant's absence.²⁰² As in the French civilian default procedure, no defense may be presented on behalf of the accused, and the court-martial bases its verdict solely on the evidence in the official file.²⁰³ One significant difference between the civilian and military systems occurs in the post-trial procedure. Whereas the civilian verdict and sentence against the accused automatically become nullities upon his reappearance before the court,²⁰⁴ the military defendant must file an opposition to the judgment with the military tribunal within fifteen days of being personally served with a copy of the decision.²⁰⁵ If the opposition is allowed, the judgment falls and the accused receives a new trial in the ordinary fashion.²⁰⁶ Presumably, the sentence is then executed if the opposition is denied and the case is still within the statute of limitations for the execution of the sentence.²⁰⁷

C. Summary

Similar policy interests as to the orderly administration of justice have led to a common result in both the common-law and the civil-law systems with regard to defendants who voluntarily absent themselves from trials which have already begun in their presence, namely, the in absentia trial. Although a felony in absentia trial under the common law will stop short of sentencing the absent accused, an in absentia trial under the French civil law will proceed to sentencing like an American military trial.

Despite the common need to compel recalcitrant defendants to appear before their respective courts, the two law systems each took a different path in resolving the problem posed by the defendant who simply refuses to make an initial appearance at trial. The ham-fisted process of outlawry barely changed during the course of its existence in the common law, while it developed into a sophisticated legal process under the civil law. As seen from the review of French criminal procedure, the French civil-law default process protects the essential rights which the presence of the accused is supposed to secure in the common-law system, although in a very different fashion. As two writers comparing the Anglo-American and the French systems have noted:

It may be queried, however, whether the civil law practice of trials *in absentia* is contrary to a broader concept of due process -- whether the practice is inherently and fundamentally unfair. The requirements of actual notice and the admission of excusing causes, as well as the possibility of a new trial *de novo* and the non-enforceability of judgment after a certain period, all seem to be predicated upon concepts of due process in the more universal sense of the term and at the same time effectively preclude any substantial prejudice to the accused by reason of a trial during his [] absence.²⁰⁸

V. In Absentia War Crimes Trials

A. International Tribunals

1. International Military Tribunal, Nürnberg

(a) Origin of In Absentia Jurisdiction

The Moscow Declaration of November 1, 1943, reaffirmed the Allies' policy of holding Nazi leaders accountable for war

crimes.²⁰⁹ Although there was agreement on the general policy among the Allies, the exact method by which war criminals would be held accountable was unresolved until after Germany surrendered. As late as May, 1945, the British government preferred summary execution of the major Nazi leaders rather than trial.²¹⁰ The Soviet Government initially believed that trials were unnecessary, for they had already been convicted by executive act in the Moscow Declaration.²¹¹ President Roosevelt himself was lukewarm to the idea of war crimes trials.²¹²

After President Roosevelt's death in April 1945, however, the War Department team that had been planning for war crimes trials found President Truman strongly in favor of war crimes trials.²¹³ President Truman unilaterally appointed U.S. Supreme Court Justice Robert Jackson as chief counsel for the case against the major Nazi leaders on May 2, 1945.²¹⁴ Justice Jackson and the War Department team immediately set to work drafting an executive agreement regarding a war crimes tribunal upon which negotiations between the U.S., Britain, France and the Soviet Union would be based.²¹⁵

The actual memorandum which was presented to the Allies at a meeting of foreign ministers at San Francisco on May 3, 1945 was the result of numerous redrafts and revisions which had been made within a three-day period to a pre-existing War Department document.²¹⁶ Vague provisions dealing with the possibility of in absentia trials were included in memorandum early in the drafting process, and were retained in modified form in the final

version.²¹⁷ The inclusion of this provision in an American drafted document is curious, for it is inconsonant with both ordinary American criminal practice,²¹⁸ and the Roosevelt administration's position on a war crimes tribunal's personal jurisdiction.²¹⁹ One writer suggests that the timing of the revisions explains the inclusion of the in absentia provision. Although Adolf Hitler and Joseph Goebbels were reported to have committed suicide on April 30, 1945, this information could not be immediately verified.²²⁰ An in absentia trial procedure would allow the Allies to try Hitler and immediately execute his sentence if he was subsequently arrested.²²¹

In its final form, the draft executive agreement provided for the tribunal to decide "to what extent proceedings against defendants may be taken without their presence."²²² After the San Francisco meeting, the American team revised the draft many times prior to the London conference in late June, 1945, but did not make the Allied representatives aware of these revisions until just before the conference began.²²³ Prior to the London Conference, however, the British and the Soviets responded to the draft with which they had been presented in San Francisco. Significantly, these responses agreed to use the draft as a basis for negotiations on the creation of the IMT, but did not object to the in absentia provision.²²⁴

During the London Conference, the Soviets suggested changing the in absentia provision to read "[t]he Tribunal shall have the right to take proceedings against . . . [an absent defendant] if

the defendant should be in hiding or if the Tribunal should find it necessary to conduct the hearing in the absence of the defendant."²²⁵ A subsequent British redraft provided that "[t]he Tribunal shall have the right to take proceedings against [an absent defendant] . . . if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence."²²⁶ The language of the final draft of IMT Charter mirrors that used in this British version of the provision.²²⁷

(b) Application: The Bormann Trial

Of the twenty-two defendants tried by the IMT at Nürnberg, only Martin Bormann, Hitler's de facto secretary and head of the Nazi Party Chancellery, was tried in absentia. Although Bormann had been on the original British lists of major war criminals, neither the British nor the Americans seriously considered prosecuting him by the time the negotiations commenced regarding which Nazi officials were to be indicted.²²⁸ The French and the Soviets, however, who collectively had few prisoners of note in custody, demanded that he be indicted.²²⁹

When the IMT convened in mid-October 1945, the judges were not pleased with the prospect of trying Bormann in absentia.²³⁰ Despite the evidence which suggested that Bormann was dead, the prosecutors convinced the IMT to delay acting on his case at least until the beginning of the trial itself.²³¹ After the trial began, Dr. Bergold, Bormann's appointed attorney, received permission from the IMT to present his defense last in light of

the difficulties arising from preparing a case for an absent defendant.²³² Dr. Bergold did not challenge the in absentia provision of the IMT Charter; instead, his efforts focused on proving that Bormann was dead and should therefore not be tried.²³³

In his closing argument, Dr. Bergold finally attacked the IMT's in absentia power under Article 12 of the IMT Charter. The IMT found Dr. Bergold had waived any objection to an in absentia trial in light of his defense of Bormann before the tribunal, and rejected his application as untimely.²³⁴ Dr. Bergold shifted his attack, and argued that an Article 12 in absentia trial, in which there was no chance for a retrial if the defendant subsequently appeared, was a novel creation of the IMT Charter and inconsonant with civil-law jurisprudence regarding in absentia trials.²³⁵ Bergold noted that the case of industrialist Gustav Krupp, who could not appear before the IMT because of his poor health, was postponed for that very reason and not tried in absentia.²³⁶ Similar considerations of justice, including the inherent practical problems of representing an absent defendant at trial,²³⁷ should cause the IMT to suspend or postpone the trial against Bormann, Bergold argued.²³⁸ In its judgment, the IMT noted that "his counsel, who ha[d] labored under difficulties, was unable to refute [the overwhelming] evidence. In the face of [the documentary evidence], which [bore] Bormann's signature, it is difficult to see how he could do so even were the defendant present."²³⁹ Bormann was sentenced to death.²⁴⁰

(c) *Summary*

Bormann's trial is often cited as authority for the international acceptance of in absentia war crimes trials.²⁴¹ The result-oriented planning which led to the initial inclusion of the in absentia provision in the IMT Charter and the political considerations which actually led to the indictment of an absent defendant, however, suggest that it is an example of qualified legitimacy.²⁴² Significantly, none of the large number of trials of lesser war criminals conducted by the U.S. in Germany after the initial Nürnberg trials were tried in absentia.²⁴³ Bormann's trial also revealed several functional shortcomings of in absentia war crimes trials. If a defense counsel is allowed to make a defense for the absent accused before the tribunal, the lack of communication between the two severely hampers its presentation. Further, those accused present at trial have nothing to lose by incriminating the absent defendant to lessen their degree of culpability. Finally, while the absence of a defendant of the stature of Bormann may work no particular injustice against in a case where there is overwhelming corroborative (and particularly documentary) evidence, such is probably not the case in a more typical war crimes trial. Acts of violence, perpetrated in a combat environment and recollected through the memories of traumatized victims, do not necessarily lend themselves to the easy resolution of such issues as identity or justification.²⁴⁴

2. *Bertrand Russell's International War Crimes Tribunal*

Although not a true war crimes trial in the sense that it was convened by a private organization and was lacking in judicial rigor and impartiality, the International War Crimes Tribunal created by the Russell Peace Foundation merits study in the context of in absentia war crimes trials. Lord Bertrand Russell began organizing a tribunal to enquire into American responsibility for war crimes in Indochina in 1965.²⁴⁵ Difficulties in arranging for visas for North Vietnamese and Viet Cong witnesses delayed finding a site for the tribunal's hearings,²⁴⁶ but finally Sweden allowed the First Session of the tribunal to be held in Stockholm between May 2 and 10, 1967.²⁴⁷

The tribunal was composed of Vladimir Dedijer, a Yugoslav historian, who was chairman and president of the sessions, and twenty-one other members.²⁴⁸ Although the tribunal styled themselves as a commission of inquiry rather than a court,²⁴⁹ it tried the U.S. government and its allies in absentia,²⁵⁰ and issued verdicts of guilt.²⁵¹ The tribunal heard the testimony of many witnesses on both the factual and legal aspects of the U.S. involvement in the Vietnamese War. Much of the factual testimony was given in the form of reports compiled by tribunal investigative teams, who had worked through official translators of the North Vietnamese and Cambodian governments.²⁵²

The tribunal also heard the testimony of witnesses who focused on the social and political aspects of the use of force by the United States throughout its history and during the course of the on-going Cold War.²⁵³ The tribunal used this information to

cast the U.S. in the role of a world-wide unlawful aggressor.²⁵⁴ The tribunal's reception of this information exposed the tribunal to criticism that it had skewed the proceedings and the admission of evidence to reach predetermined conclusions.²⁵⁵ Critics also argued that the tribunal showed its bias by ignoring information regarding war crimes committed by the Viet Cong and the North Vietnamese,²⁵⁶ and by judging the very indictment it had issued against the U.S. and its allies.²⁵⁷

The proceedings of Lord Russell's tribunal are an extreme example of the in absentia war crimes trial's vulnerability to abuse. Any organization or individual can conduct an in absentia trial, and use it as a forum to promote its particular viewpoint on non-legal issues while ostensibly conducting judicial proceedings. Attempting to imbue political opinion with the legitimacy of judicial proceedings does not further the enforcement of international human rights, for it taints the validity of objective evidence of real war crimes that may be put forth during the proceedings.²⁵⁸

B. National Tribunals

1. World War I

(a) France

Under the terms of the Versailles Treaty, alleged German war criminals were to be tried by Allied national or mixed military tribunals.²⁵⁹ These terms were particularly unpopular among the German public and military, for there was great sentiment against surrendering soldiers whom many considered to be war heroes

rather than criminals.²⁶⁰ Finally, after difficult negotiations, the Allies agreed to let Germany try the alleged war criminals itself.²⁶¹ After many delays, the Criminal Chamber of the German Supreme Court in Leipzig began trying the accused individuals in the spring of 1921.²⁶² Forty-five cases were submitted by the Allies, but only twelve defendants were actually tried.²⁶³ Of those tried, six were acquitted and the rest received lenient sentences.²⁶⁴

At a joint conference of Allied ambassadors in July, 1922, dissatisfaction with the trials resulted in an agreement that the Allied nations could try alleged German war criminals in absentia.²⁶⁵ The French had occasionally court-martialed alleged German war criminals in absentia since the end of the war,²⁶⁶ but beginning in late 1922, they commenced an extensive program of in absentia courts-martial for war crimes.²⁶⁷ As the new French government under Premier Édouard Herriot began a policy of conciliation with Germany in 1924, however, the trials proved to be a serious obstacle to the reestablishment of friendly relations between the two countries.²⁶⁸ In November, 1924, an aged German general who had been convicted in absentia was arrested in Alsace-Lorraine after visiting the grave of his father-in-law.²⁶⁹ The general was promptly court-martialed at Lille on November 20, 1924, and sentenced to a year's imprisonment for pillage.²⁷⁰ Although Premier Herriot pardoned the general after several weeks, the incident caused the Germans to demand immunity for all its technical advisors sent to France

to assist in the on-going trade negotiations.²⁷¹

Between 1922 and the winter of 1926, when the French government discontinued the trials, over 1,200 Germans were tried by these courts.²⁷² The French gradually lost interest in those who had been tried, and by 1929 were only subjecting them to police surveillance if they visited France.²⁷³

(b) Belgium

In the aftermath of the unsuccessful Leipzig trials, Belgium also began trying alleged German war criminals in absentia.²⁷⁴ The Belgians tried approximately eighty cases before stopping the trials in late October, 1925.²⁷⁵ Little information is available about these trials, but most likely they were conducted similarly to the French trials, given the influence of the French Code of Criminal Examination upon Belgian criminal procedure.²⁷⁶

(c) Bulgaria

Primarily as the result of indifference on the part of the major Allied powers, Bulgaria was also allowed to try its own war criminals.²⁷⁷ The driving force behind the initial war crimes trials conducted by Bulgaria appears to have been Yugoslavian anger at the atrocities committed by Bulgarian occupation forces in Serbia.²⁷⁸ While these war crimes trials were being conducted, however, another sort of "war crimes" trial was pending in the capital city of Sofia.

On November 4, 1919, the members of former Premier Vasil Radoslavov's wartime cabinet who were still in Bulgaria were arrested.²⁷⁹ Radoslavov and other government officials had fled

to Germany after his government fell in June, 1918.²⁸⁰ The Bulgarian government, controlled by the radical Agrarian Party, began efforts to extradite Radoslavov and others to stand trial for war crimes.²⁸¹ Finally, in late March, 1921, the legislature formally indicted the Radoslavov government officials.²⁸² The actual trials, however, did not begin until October 10, 1921.²⁸³ Bulgarian extradition efforts were unsuccessful, so Radoslavov and others were tried in absentia.²⁸⁴

The court was composed of six learned judges from the regular judiciary, and twelve "People's Judges."²⁸⁵ The court's jurisdiction was based on "The Law for the Prosecution of Originators of National Defeat;" the essence of which was the retroactive prohibition against losing the war.²⁸⁶ The trial dragged on interminably, and the trials appeared to be geared more toward eliminating opponents of the Agrarian Party than adjudicating war crimes.²⁸⁷ On April 1, 1923, verdicts and sentences were finally announced.²⁸⁸ Radoslavov and five others were sentenced to life imprisonment, and seven others were sentenced to various terms of imprisonment from five to ten years.²⁸⁹ All of the convicted defendants were ordered to pay the cost of the war damage to the country.²⁹⁰

(d) Turkey

Soon after the Armistice of Mudros was signed in October 1918, Turkey agreed to try those allegedly responsible for the Armenian genocide and war crimes against Allied soldiers.²⁹¹ In particular, the British were concerned over the extreme

maltreatment suffered by British prisoners of war in Turkish camps.²⁹² Under the direction of the new Grand Vizier, Damad Ferid Pasha, two former officials involved in the atrocities against Armenians were court-martialed in April 1919.²⁹³ Despite the strong nationalist sentiment against cooperation with the Allies that these trials aroused, the royal government pressed on with war crimes prosecutions.²⁹⁴

On April 27, a special court-martial convened in Constantinople to try approximately twenty wartime leaders.²⁹⁵ Three of the more important leaders, Enver Pasha, Talaat Bey, and Djemal Pasha, had fled to Germany just before the armistice and were tried in absentia.²⁹⁶ The former Minister of Finance, Djavid Bey, had fled in March 1919 after the discovery of serious financial improprieties during his tenure, and was also tried in absentia.²⁹⁷

During the trials, Greece occupied Smyrna with the apparent consent of the Allies.²⁹⁸ Atrocities committed by the Greeks in the occupied area both inflamed anti-Allied sentiment and discredited the idea of war crimes trials for Turks accused of similar acts.²⁹⁹ After certain Turkish prison officials released alleged war criminals they had been holding, the British were concerned that all the suspects would be released.³⁰⁰ British forces took many of the suspects into custody, and sent them to Malta.³⁰¹ The detainees included many of the officials then standing trial in Constantinople.³⁰²

Turkey requested the Allies to compel Germany to extradite

Enver Pasha and the other in absentia defendants who had taken refuge there in June 1919, but this request was refused.³⁰³ The initial trials concluded on July 11, 1919.³⁰⁴ Enver Pasha, Talaat Bey, and Djmemal Pasha were each sentenced to death, and Djavid Bey was sentenced to fifteen years' imprisonment.³⁰⁵ The accuseds taken by the British were acquitted.³⁰⁶ Shortly after the trial, Turkey once again asked the Allies to let them extradite Enver Pasha.³⁰⁷ Again, the Allies refused.³⁰⁸

The British continued to arrest suspected war criminals and "nationalist undesirables" in the Constantinople area and deport them to Malta throughout the second half of 1919 and into the early spring of 1920.³⁰⁹ Finally, on March 16, 1920, the Allies actually occupied Constantinople and arrested many prominent nationalist politicians.³¹⁰ These detainees were likewise sent to Malta.³¹¹

During this time, a rebel nationalist movement under the leadership of General Mustafa Kemal had grown increasingly strong in Asia Minor.³¹² The Nationalists retaliated against the British by seizing many British hostages, and declared their rebel government at Ankara to be the true Turkish government in light of the occupation of Constantinople.³¹³ The royal government responded by trying Kemal in absentia and sentencing him to death on May 12, 1920.³¹⁴ The Nationalist High Court at Ankara then tried members of the Sultan's government, including the Grand Vizier, in absentia on charges of treason and sentenced them to death.³¹⁵

While the British and the Nationalists negotiated fruitlessly over the hostages issue, several of the more notorious detainees at Malta escaped to Italy.³¹⁶ Finally, on November 1, 1921, all of the British hostages were exchanged for the remaining Turkish detainees, and British war crimes trials efforts with regard to Turkey ceased without the British having tried a single alleged war criminal.³¹⁷ The Treaty of Lausanne, signed on July 24, 1923, was accompanied by a "Declaration of Amnesty" for all alleged offenses occurring between August 1, 1914 and November 20, 1922.³¹⁸

(e) *Summary*

The actual adjudication of the French and Belgian in absentia trials may have been relatively free of political influence and in accordance with the norms of due process in each respective civil-law system. The Bulgarian and Turkish trials, however, stand out as examples of the use of the in absentia trial as a weapon of political warfare rather than a legitimate means to enforce international human rights. In fairness to the Turkish government at the time, however, it would not have been compelled to try its war criminals in absentia had the Allies been more forceful in requiring Germany to extradite those individuals. The British seizure of certain of the defendants who actually were standing trial in Constantinople may have been based upon the desire to see substantial justice done, but it began a trend of hostage taking on both sides that clearly did nothing to further the development of international human rights.

2. World War II

(a) France

The Ordinance of August 28, 1944, authorized French military tribunals to try hostile foreign nationals for violations of French criminal law and the law of war "committed since the beginning of hostilities, either in France or in territories under the authority of France . . .".³¹⁹ Permanent Military Tribunals in France were authorized to hear such cases under Article 6 of the Ordinance.³²⁰ Allied Control Council Law No. 10 authorized French Military Government Courts in the French Occupation Zone of Germany.³²¹ The jurisdiction of the French Military Government Courts was set out in Ordinances No. 20 of November 25, 1945, and No. 36 of February 25, 1946, promulgated by the French Commander-in-Chief of the French Occupation Zone.³²² Ordinance No. 20 provided that the "military government tribunals [were] competent to try all war crimes defined by international agreements in force between the occupying powers," so long as the perpetrators were not of French nationality and the crimes were committed outside French territory.³²³ Ordinance No. 36 of February 25, 1946, in accordance with Allied Control Council Law No. 10, gave these courts expanded jurisdiction to try crimes against peace and humanity.³²⁴

Pursuant to the Act of October 5, 1944, both the Permanent Military Tribunals and the Military Government Courts were composed of five military judges until June 1, 1946, the legal date of the termination of the war.³²⁵ After June 1, 1946,

civilian judges sat as the presidents of the courts, which then included six military judges rather than five.³²⁶ The procedure used in French war crimes courts-martial was quite similar to that used in ordinary courts-martial, which itself was very similar to that used in French civilian criminal trials.³²⁷

(i) *The Wagner Trial*

Between April 23 and May 3, 1946, Robert Wagner, Nazi Party regional leader and head of the Alsatian Civil Government during the German occupation, and six other officials, were tried by the Permanent Military Tribunal at Strasbourg.³²⁸ One of the accused, Richard Huber, failed to show up for trial within the five day period then allowed by the Code of Military Justice.³²⁹ The court president then found that the trial against Huber would proceed in his absence, and that judgment against him would be "passed in default."³³⁰

The evidence at trial showed that Huber, former President of the Nazi Special Court at Strasbourg, was informed by codefendant Ludwig Luger of sentences that Wagner wished to have adjudged in certain cases before the Special Court.³³¹ In one particular case, the so-called "Ballersdorf Trial," Huber completely disregarded evidence which established that none of the thirteen defendants had shot and killed a German border guard.³³² Prior to final arguments being heard in the case, the evidence showed that Huber, Luger, and Gestapo³³³ and SD³³⁴ officials left the court building to apparently discuss the case with Wagner.³³⁵ Upon his return, Huber found all the defendants guilty and sentenced them

to death.³³⁶

Huber was found guilty of murder by complicity, "on the ground that under pressure from Wagner he had pronounced death sentences against [the accused]," and that in doing so he was not acting on superior orders.³³⁷ Huber was sentenced to death, and there was no appeal of the judgment.³³⁸

(ii) The Holstein Trial

In the early winter of 1947, German Army Major Franz Holstein, Captain Georg Major, Emil Goldberg (an SD adjutant), and twenty-one absent defendants were tried by the Permanent Military Tribunal at Dijon.³³⁹ The absent accused included military personnel and Gestapo and SD officials.³⁴⁰ Each of the accused was charged with various offenses, including the abuse and killing of civilians, destruction of property by arson, and pillage.³⁴¹

The evidence at trial showed that between June and August, 1944, the defendants belonged to units involved in a campaign to eliminate French resistance units from the area of north-eastern France for which they had responsibility.³⁴² During this action, at least thirty French civilians and partisans were summarily executed, numerous other civilians were brutalized, and thirty-two homes and farms were burned down.³⁴³ Although each of the defendants present at trial were convicted, two of the in absentia defendants were acquitted on grounds of insufficient evidence.³⁴⁴ Those in absentia defendants convicted, however, all received the death sentence.³⁴⁵

(iii) *The Becker Trial*

In the summer of 1947, Gustav Becker, Wilhelm Weber, Karl Schultz, and seventeen absent defendants were prosecuted for war crimes before the Permanent Military Tribunal at Lyon.³⁴⁶ The defendants were all former officers, non-commissioned officers, and enlisted men of the German Customs Commissariat in Savoy.³⁴⁷ The evidence at trial established that, except for Schultz, the defendants had participated in the arrest and severe beating of several French civilians.³⁴⁸ The victims were subsequently transported to German concentration camps, where they died.³⁴⁹

Schultz was acquitted, but the other defendants were each found "guilty of unlawful arrests and ill-treatment, and of having 'caused death without intent to inflict it'."³⁵⁰ Each defendant tried in absentia was sentenced to twenty years' hard labor, while Becker and Weber each received three years' imprisonment.³⁵¹

(iv) *The Das Reich Trials*

In the summer of 1944, the 2nd SS³⁵² Panzer Division (*Das Reich*), became engaged with French Resistance units as it moved north to meet the Allied invasion in Normandy.³⁵³ At the village of Oradour-sur-Glane, the unit massacred 642 villagers, including 207 children.³⁵⁴ A major complicating factor in prosecuting those responsible for the massacre was that the defendants included a number of Alsatians, who had been recruited into the German Army after Germany reannexed Alsace-Lorraine under the terms of the armistice with France.³⁵⁵ Many of the Alsatian accused had not

personally killed French civilians, and for this reason proceedings against them had apparently been dropped before 1948.³⁵⁶ In 1948, however, the French passed the so-called "Collective Responsibility Law," which retroactively made many of the Alsatian accused liable for their actions at Oradour.³⁵⁷

The trial began in early January 1953, and it quickly became obvious that some of the more culpable in absentia defendants, such as the division commander, former SS General Lammerding, were alive in Germany.³⁵⁸ The French had requested the British Military Government to arrest Lammerding in 1950, but apparently did not formally request his extradition at that time.³⁵⁹ Lammerding was then tried and convicted in absentia by the Permanent Military Tribunal at Bordeaux on July 4, 1951 for ordering massacres at Tulle, and sentenced to death.³⁶⁰

Prior to the Oradour-sur-Glane trial, France again had not specifically requested Lammerding's extradition from the British.³⁶¹ France finally did so in early February, 1953, during the trial.³⁶² The British had instituted a formal extradition procedure in 1948 and 1949 for alleged war criminals,³⁶³ however, and it was not until February 26, 1953 that a British magistrate issued the warrant for Lammerding's arrest.³⁶⁴ In the meantime, Lammerding had disappeared and had apparently fled to the American Zone.³⁶⁵

Meanwhile, seven German soldiers and fourteen Alsations were actually present during the trial before the Permanent Military Tribunal of Bordeaux.³⁶⁶ Forty-two German soldiers were tried in

absentia.³⁶⁷ The trials were particularly unpopular in Alsace, for many Alsatians saw the troops who had been forcibly enlisted in the SS as victims of Nazism rather than criminals.³⁶⁸ As a result, the French National Assembly repealed the collective guilt law during trial, and the prosecution was forced to move for separate trials for the Alsatians on February 3, 1953.³⁶⁹

At the trial of the German soldiers, the defense counsel for those with some degree of command responsibility argued that their clients had not actually killed anyone, while those representing junior soldiers who actually did the killing argued that they should be allowed to invoke the defense of superior orders as the Alsatians had done.³⁷⁰ The defendants' arguments all had one common theme, however; the majority of the blame was fixed on the absent Lammerding and his absent subordinate commanders, Major Dickmann and Captain Kahn.³⁷¹

The verdicts and sentences were announced on February 12, 1953.³⁷² German Army Sergeant Major Karl Lentz was sentenced to death, and the six other German soldiers were sentenced to various terms of punishment between ten and twelve years.³⁷³ Interestingly, one of the in absentia defendants, Wilhelm Nobbe, was acquitted on grounds of insanity.³⁷⁴ The other in absentia defendants were all sentenced to death.³⁷⁵

(v) The Barbie Trials

Klaus Barbie, head of the Gestapo in Lyon, was particularly ruthless in his efforts to eliminate the French Resistance movement in the Lyon area and especially thorough in deporting

people to German death camps.³⁷⁶ The French issued warrants for his arrest on August 31 and September 12, 1945, but were unaware of his whereabouts until 1948.³⁷⁷ That year, René Hardy, a former French Resistance leader, was to be tried for allegedly betraying another Resistance leader, Jean Moulin, to the Gestapo in Lyon.³⁷⁸ French intelligence officials found out that Barbie was in American hands, and wanted to question him as a potential witness.³⁷⁹

By this time, Barbie had become a valued agent of the American Counter Intelligence Corps [hereinafter CIC].³⁸⁰ The CIC allowed French agents limited access to Barbie, but refused to send him to France to testify in Hardy's trial when the French would not agree to let him return to Germany.³⁸¹ When the French began to take an active interest in Barbie as a defendant rather than just a witness, American intelligence officials played an active role in delaying the French extradition request from being filed until he had been spirited out of Europe and into South America in 1951.³⁸²

Angered by American intransigence in prosecuting Barbie, the French tried Barbie in absentia twice.³⁸³ The first trial, on April 29, 1952, was for executions and deportations of alleged Resistance members in the Jura in April, 1944.³⁸⁴ The second trial, on November 25, 1954, was for executions conducted in Montluc prison, in Lyon.³⁸⁵ Neither of the death sentences were executed before the twenty year statute of limitations on felony punishments expired.³⁸⁶ Accordingly, after Barbie was finally

extradited from Bolivia in 1983 to stand trial in France, he was charged in 1986 mostly with "crimes against humanity," i.e., the deportation of approximately 450 Jews and over 300 Resistance members to German death camps.³⁸⁷

Barbie's trial began on May 11, 1987 and continued until July 4, 1987.³⁸⁸ Ironically, this trial was in a sense in absentia, for Barbie largely boycotted its sessions by remaining silent behind his enclosure at the dock.³⁸⁹ Barbie was convicted of all charges and sentenced to imprisonment for life.³⁹⁰

(vi) Indochinese Trials

On the basis of the Ordinance of August 28, 1944, French military tribunals also tried war crimes cases in Indochina after World War II.³⁹¹ Unlike the trials held before European tribunals, however, little information is available about these trials. Not only did the trials not begin until 1947,³⁹² media coverage of the trials was neither consistent nor thorough.³⁹³ 230 Japanese soldiers were tried during the course of thirty-nine trials, which resulted in 198 convictions.³⁹⁴ Of the forty-three accuseds tried in absentia, thirty-seven were sentenced to death, as compared to twenty-six of the 187 accused who were physically present before the courts receiving the death sentence.³⁹⁵

(vii) Summary

At least 1,700 German soldiers and officials were tried and convicted in the French Zone of Occupation by military tribunals.³⁹⁶ It is unknown if any were tried in absentia. In

convicted in the French Zone of Occupation by military tribunals.³⁹⁶ It is unknown if any were tried in absentia. In France and Algeria, French military tribunals tried at least 1,918 German accuseds who were physically present at their trials.³⁹⁷ 956 individuals were tried and sentenced in absentia before these same tribunals. The number of acquitted in absentia defendants is unknown.

Although it is difficult to tell from the reported cases, it is reasonable to assume that the exclusion of evidence of extenuating circumstances on behalf of the absent accused, in combination with the increased culpability attributed to them by the defendants present in court, probably led to the disproportionately high number of absent defendants sentenced to death or more harshly than those convicted of similar crimes but present in court.³⁹⁸ One German newspaper, however, suggested that the absence of the accuseds in these trials allowed the French courts to be "guided by a gross stereotype," and that "[t]hey sentenced to death in absentia many hundreds of soldiers of the German Wehrmacht for the reason alone that their units took part in executions by firing squads of the fighters of the French resistance."³⁹⁹

The trials of the *Das Reich* soldiers and of Barbie revealed a more serious shortcoming at the jurisprudential level. In the case of General Lammerding and of Barbie in his first two trials, the sentences were never carried out. Lammerding's situation was particularly galling to former members of the French

Resistance,⁴⁰⁰ for he lived quite openly in Düsseldorf until his death.⁴⁰¹ In 1954, West Germany entered into an agreement with Britain, France, and the U.S. which provided that sentences pronounced by the civilian and military courts of the three Western Allies remained in force and could not be reviewed by German courts.⁴⁰² Paradoxically, this agreement had the effect of preventing German officials from filing charges against those defendants convicted in absentia and living in the Federal Republic, as well as not beginning proceedings to execute the sentences.⁴⁰³

Former members of the French Resistance pressured the French government to enforce the in absentia sentences, and on February 2, 1971 the French and German governments signed an agreement which allowed West German courts to begin criminal proceedings against those Nazi war criminals whose in absentia sentences had not yet been executed.⁴⁰⁴ The agreement was not ratified by the Bundestag (Federal Parliament) until 1975,⁴⁰⁵ however, and even then was to be applied only to cases involving killings.⁴⁰⁶

Barbie's case causes one to question the efficacy of proceeding to sentence against an absent accused under the ordinary French default procedure. If the accused is determined to avoid the jurisdiction of the court and has little to forfeit in terms of property, the sentence in absentia is a nullity after the statute of limitations period expires. In such a case, the sentence is no more effective at bringing the accused before the court than the ancient practice of outlawry.

trial level. As in Bormann's trial before the IMT, the defendants present at trial often tried to reduce their degree of culpability by shifting blame onto the absent defendants.⁴⁰⁷

While inculping others who are not before the tribunal may be a common defense tactic regardless of the type of trial, its effect in an in absentia trial is magnified because the tribunal can actually convict the inculcated person. If the judgment is handed down in a default trial process, however, the defendant can always appear before the tribunal and seek to reopen the case, and thereby minimize any prejudice to him from slanted testimony at the original trial.

(b) Poland

Prior to liberation, the Polish Resistance apparently operated a system of "courts" to pass judgment on Polish collaborators and German war criminals.⁴⁰⁸ The sessions of these courts were secret, and the sentences, usually death, were carried out expeditiously and without notice to the unknowing defendants.⁴⁰⁹ The names of the executed defendants were then published in the underground newspaper, so that "people [would] know it [was] a legal act and not private vengeance."⁴¹⁰

The formal Polish war crimes trial effort commenced with the promulgation of the Decree Concerning the Punishment of Fascist-Hitlerite Criminals Guilty of Murder and Ill-Treatment of the Civilian Population and of Prisoners of War on August 31, 1944, by the Polish Committee of National Liberation.⁴¹¹ War crimes jurisdiction was originally vested in Special Courts composed of

by the Polish Committee of National Liberation.⁴¹¹ War crimes jurisdiction was originally vested in Special Courts composed of one learned judge and two lay judges.⁴¹² For the most part, these courts followed the Polish Code of Criminal Procedure; but there was no appeal from the decisions of the Special Courts.⁴¹³

The Special Courts were abolished by the Decree of October 17, 1946,⁴¹⁴ and war crimes jurisdiction was given to the Supreme National Tribunal.⁴¹⁵ The Supreme National Tribunal was nominally seated in Warsaw, but in practice many cases were tried where the crimes had allegedly been committed.⁴¹⁶ The First President of the Polish Supreme Court also served as the President of the Supreme National Tribunal.⁴¹⁷ The Supreme National Tribunal consisted of three learned judges and four lay judges.⁴¹⁸ The decisions of the Supreme National Tribunal were final.⁴¹⁹

Under the Decree of January 22, 1946,⁴²⁰ "the fact that the person to be indicted ha[d] not been apprehended [was] no bar to lodging the indictment and to holding the trial in his absence."⁴²¹ Because the Polish Code of Criminal Procedure's provisions regarding in absentia trials were inapplicable to war crimes trials, hearings before the Supreme National Tribunal in which the defendants were absent were not even considered in absentia.⁴²² The absent accuseds' relatives could appoint counsel for them, however, and trials could be reopened on the basis of new evidence on the merits or on sentencing.⁴²³

Despite the power granted it by Article 13, the Supreme National Tribunal does not appear to have tried any cases in

absentia before it ceased operation in August 1948.⁴²⁴ Many other war crimes trials took place in Poland under inferior courts, but it is unclear whether any of these trials were in absentia.⁴²⁵ The lack of empirical information makes it difficult to assess the application of the in absentia procedure before the Supreme National Tribunal. The terms of the Decree of January 22, 1946 suggest that the ordinary Polish criminal default procedure was inapplicable. The lack of the right to an appeal and the denial of the right to a new trial de novo to absent defendants convicted in default appear to make this procedure no more consonant with accepted norms of civil-law due process than was the IMT's procedure.

(c) Soviet Union

The Soviet Constitution decreed the "unity of legislative regulation throughout the territory of the USSR, [and] the establishment of Fundamental Principles of Legislation of the USSR and the Union Republics."⁴²⁶ The Fundamental Principles were a set of all-union codes, each of which covered the principles applicable to a specific legal area, such as criminal procedure or court organization.⁴²⁷ The law of each union republic consisted of a series of legislative codes based upon the Fundamental Principles, with slight variations depending on local customs.⁴²⁸ To the extent that all-union law did not apply, courts-martial applied the substantive law of the republic which was the situs of the crime, and the procedural law of the republic in which the court was convened.⁴²⁹

On April 19, 1943, the Presidium of the USSR Supreme Soviet issued an unpublished decree that apparently prescribed the death penalty for grave crimes against Soviet citizens by Axis forces.⁴³⁰ Under the decree, war criminals were to be tried by divisional courts-martial.⁴³¹ Under the applicable Soviet Union and Union Republic statutes, these courts most likely had in absentia trial power.⁴³² Circumstantial information suggests that at least during the war and the immediate post-war period, however, this power was not used.

Between December 15 and 18, 1943, a war crimes trial was held before a military tribunal in Kharkov.⁴³³ The pretrial investigation into atrocities allegedly committed by German soldiers and local auxiliaries led to the indictment of several senior SS and SD officers, as well as two company grade officers and one non-commissioned officer.⁴³⁴ Only the three more junior soldiers were actually present at trial.⁴³⁵ Despite the indictment and the evidence before the tribunal which implicated the more senior officers, they were not tried in absentia.⁴³⁶

The Soviets apparently conducted no further war crimes trials until after World War II.⁴³⁷ Beyond its participation in the IMT at Nürnberg, the Soviets also tried no war crimes cases in occupied Germany.⁴³⁸ Interestingly, the Soviet judge at Nürnberg, Nikitchenko, was among those initially opposed to trying Bormann in absentia.⁴³⁹ In Soviet territory, however, approximately 10,000 German soldiers were tried and convicted of war crimes.⁴⁴⁰ The Soviets obviously had no shortage of prisoners

in custody to administer justice upon, and therefore likely had little motivation, politically or otherwise, to try suspected war criminals in absentia right after the war.

Circumstances had changed by the early 1960's, however. The first in absentia trials of World War II war criminals appear to have occurred in the winter of 1962, during a particularly tense time between the Soviet Bloc countries and the West.⁴⁴¹ On January 20, 1962, a court in Tartu, Estonia, tried three alleged war criminals in absentia and sentenced each of them to death.⁴⁴² One of the men, Karl Linnas, was living in the United States, while a second, Erwin Viks, was living in Australia.⁴⁴³ The U.S. State Department refused Soviet demands that Linnas be extradited.⁴⁴⁴ In June, 1962, three Lithuanians were convicted of war crimes during their collaboration with German armed forces in World War II.⁴⁴⁵ Soviet requests that the U.S. extradite one of the men, Antanas Impulevicius, were apparently denied as well.⁴⁴⁶

(d) Yugoslavia

Under Yugoslav Law No. 619, of August 25, 1945, civilian war criminals were to be tried in People's County Courts, and military suspects were to be court-martialed.⁴⁴⁷ The Supreme Courts of the federal republics reserved the right to try important cases.⁴⁴⁸ Although Yugoslavia probably tried a very large number of Axis nationals as war criminals, no definitive information is available on the exact number of individuals tried.⁴⁴⁹ The records of the United Nations War Crimes Commission show that at least thirty-two German soldiers and officials were

tried and sentenced by Yugoslav courts,⁴⁵⁰ as well as two Hungarian generals.⁴⁵¹ It is unknown whether any of these trials were conducted in absentia.

At least one in absentia trial of "war criminals" was conducted in post-war Yugoslavia, however. On June 10, 1946, the Military Council of the Yugoslavian Supreme Court convened a large trial involving twenty-four alleged "war criminals and traitors."⁴⁵² The principle defendant, General Dragoljub-Draza Mihailovic,⁴⁵³ a Yugoslavian Serb, was accused of ordering the deaths of captured communist Partisans and Croat and Muslim civilians during his collaboration with both the occupying Axis powers and the Allies.⁴⁵⁴ Eight officials of the pro-Western government in exile and two political leaders of the Ravan Gora Chetnik⁴⁵⁵ organization were tried in absentia for allegedly authorizing these actions.⁴⁵⁶

The primary motivation behind this trial appears to have been political. The Yugoslavian government went to great lengths to invite the media,⁴⁵⁷ and the trial was broadcast on Belgrade radio.⁴⁵⁸ Procedurally and substantively, the trial exhibited little to commend it as an example of due process. Mihailovic was often examined by the court using the sworn statements of absent witnesses, about whom no finding of unavailability was made.⁴⁵⁹ When apparent inconsistencies developed in Mihailovic's testimony, the court compelled other defendants to confront Mihailovic with their versions of the facts while he was still on the stand.⁴⁶⁰ Defense counsel rarely asked questions in court;

when they did, it was generally just to clarify points raised during the court president's examination of Mihailovic.⁴⁶¹ Although their counsel made arguments on their behalf at the closing of the trial, the other defendants were not allowed to testify.⁴⁶² All of the defendants were found guilty, and the in absentia defendants were sentenced variously to death or terms of imprisonment.⁴⁶³

One expert on the law of war attributes the savagery of the atrocities which have occurred in the Former Yugoslavia in large part to the Yugoslavian government's handling of the war crimes which were committed during World War II. Ms. Francoise Hampson, senior law lecturer in the Human Rights Centre at Essex University in England, has stated:

In World War II, appalling atrocities were carried out by all sides, but there were only two symbolic war crimes trials and no acceptance of individual responsibility . . . Tito sat hard on the national identity and the war atrocities questions, but in order to bury the dead, the bodies have to be dead. Instead, Tito buried large sticks of dynamite, which have blown up today. Old wounds have opened up and old scores have been settled. Once the fighting began in 1991 there were no holds barred."⁴⁶⁴

3. *Cold War Error and Beyond*

(a) *Angola*

After the Portuguese withdrawal from Angola in 1975, civil war broke out between the many political and ethnic factions which had been fighting the Portuguese.⁴⁶⁵ Western mercenaries were employed by ostensibly pro-Western factions during the

conflict, which was won by the faction backed by the Soviet Bloc nations.⁴⁶⁶ The People's Revolutionary Court convened at Luanda on June 11, 1976, to try thirteen captured mercenaries for war crimes.⁴⁶⁷ The hearing was essentially a show trial, and a significant portion of evidence concerned the alleged actions of the U.S. government and the Central Intelligence Agency rather than the acts of the defendants themselves.⁴⁶⁸ Although the only crimes which the defendants committed were being mercenaries or hiring other mercenaries, nine were sentenced to significant prison terms and four were sentenced to death.⁴⁶⁹ Despite having the power to try defendants in absentia, however, the People's Revolutionary Court did not try other mercenaries in this fashion.⁴⁷⁰

(d) Bangladesh

On March 26, 1971, Bangladesh (formerly East Pakistan) declared its independence from Pakistan.⁴⁷¹ Over the next nine months, the Pakistani Army committed innumerable atrocities against the civilian population of Bangladesh in its efforts to quash the rebellion.⁴⁷² India finally intervened militarily, and with the assistance of Bangladeshi forces, defeated the Pakistani forces and captured approximately 91,000 prisoners of war.⁴⁷³ Of these, 195 were specifically identified as war criminals.⁴⁷⁴

India expressed its intent to try alleged Pakistani war criminals in its custody soon after the Pakistani surrender in January 1972,⁴⁷⁵ and in April 1972, Bangladesh stated that it too would try war criminals.⁴⁷⁶ Initially, Bangladesh planned to try

former Pakistani President Yahya Khan and General Tikka Kahn in absentia in July 1972,⁴⁷⁷ but legislation authorizing any war crimes trials was not passed until July 19, 1973.⁴⁷⁸ In August, 1973, Bangladesh, India, and Pakistan agreed to the repatriation of all Pakistani prisoners of war except for the 195 war crimes suspects.⁴⁷⁹ In April, 1974, primarily as a result of regional politics and boundary disputes, Bangladesh allowed India to return the suspects to Pakistan, despite the lack of any agreement that Pakistan would prosecute any alleged war crimes.⁴⁸⁰ In the end, Pakistan only issued an apology which "condemned and regretted any crimes that may have been committed."⁴⁸¹

(c) Kuwait

In May and June of 1991, Kuwaiti courts-martial tried a number of people accused of collaborating with the Iraqis during Iraq's occupation of Kuwait between August 1990 and February 1991.⁴⁸² While some typical war crimes were tried, the majority of the trials concerned newspaper employees who worked for an Iraqi propaganda paper during the occupation.⁴⁸³ At least two of the defendants were tried and convicted in absentia, and both were sentenced to death.⁴⁸⁴ These trials appear to have been part of the Kuwaiti persecution of non-national resident Arabs which occurred after liberation.⁴⁸⁵ Many non-national Kuwaiti residents were alleged to have cooperated with the Iraqis, and very few Kuwaitis were tried by these courts-martial.⁴⁸⁶ In addition to being politically motivated, the trials were completely lacking in due process for the defendants. Few witnesses against the

defendants were actually produced at trial, the sentences were extraordinarily harsh, and there was no appeal of the trial courts' decisions.⁴⁸⁷

(d) *Croatia*

On February 23, 1993, Yugoslav Human Rights Minister Momcilo Grubac denounced the U.N. efforts to create an international tribunal as being based upon "international hysteria about the events in Bosnia-Herzegovina," and warned that "[t]rials in absentia would produce almost no moral effect . . . and would be mock trials that would make martyrs out of war criminals."⁴⁸⁸ Subsequent to Grubac's statement, a five-member Bosnian military tribunal convened on March 12, 1993 in Sarajevo.⁴⁸⁹ Two Serb soldiers, Borislav Herak and Sretko Damjanovic, were court-martialed for slitting the throats of prisoners of war and raping many Muslim women.⁴⁹⁰ Both were convicted and sentenced to death by firing squad on March 30, 1993.⁴⁹¹ Criticisms of the trial include its use of allegedly coerced confessions without corroborating evidence,⁴⁹² and the fact that Bosnia used the trial as a "showpiece [] to illustrate the barbarity of its Serb adversaries and to convict the Bosnian Serb leadership" for its policy of ethnic cleansing.⁴⁹³

On March 16, 1993, the Grand Tribunal of the Varazdin District Court tried and convicted three Serbs in absentia for war crimes.⁴⁹⁴ Vlado Trifunovic, Borislav Popov, and Vladimir Daudovic were convicted of ordering attacks on civilians and civilian facilities in Varazdin in September, 1991, in violation

of the Geneva Convention for Civilians.⁴⁹⁵ Trifunovic and Popov were sentenced to fifteen years' imprisonment apiece, and Daudovic received ten years' imprisonment.⁴⁹⁶ The timing of this trial suggests that it was motivated more by political factors surrounding the conflicts in Yugoslavia than abstract notions of justice. Croatia apparently wanted to conduct this trial while the war crimes tribunal issue was in the limelight, for does not appear to have conducted any further in absentia trials.

V. Analysis

A. *In Absentia War Crimes Trials: An Evaluation*

A review of the in absentia war crimes trials since World War II reveals the following shortcomings in the trials themselves:

1. The procedures used in many in absentia war crimes trials often do not provide for the right to an appeal or to a new trial de novo if the defendant finally appears. This is inconsonant with the civil law norms governing in absentia trials.⁴⁹⁷
2. Usually, only legitimate governments have the ability to compel a defendant's presence at trial. An in absentia "trial" can be convened and conducted by anyone.⁴⁹⁸
3. Nations which do not cooperate in handing alleged war criminals over to war crimes tribunals are also less likely to cooperate in providing requested evidence. This further detracts from the reliability of the evidence adduced at the in absentia trial.⁴⁹⁹
4. The use of in absentia trials may lead to the counter use of such trials. This promotes the use of the in absentia war crimes trial as a political weapon, rather than a tool with which to enforce international human rights.⁵⁰⁰

5. The application of a judicially sound in absentia procedure, but one which does not allow for defense representation or consideration of extenuating circumstances, can lead to uniformly harsh results. These verdicts and sentences are vulnerable to criticism that they are based on stereotype and incomplete information.⁵⁰¹

Even when the trials themselves were not motivated or influenced primarily by political considerations, the experience of in absentia war crimes trials is that politics and post-conflict realities prevent a fair and impartial judicial accounting for violations of international human rights. To condemn the in absentia trial merely because it is susceptible to political manipulation, however, is to ignore the historical record of trials in both common law⁵⁰² and civil law⁵⁰³ countries where the right of presence has been essentially meaningless in terms of protecting the defendant's due process rights because of the impact of politics upon the trial process. This condemnation also fails to take into account the degree to which war crimes trials not using an in absentia process have been criticized as being politically motivated and no more than "victors' justice."⁵⁰⁴ The answer to avoiding undue politicization of the International Tribunal's trial process probably lies in the nature of the U.N. itself. As an international deliberative body which operates primarily through cooperation and consensus, it is unlikely that one particular political viewpoint will have a disproportionate impact on the proceedings before the International Tribunal.

B. *International Standards of Due Process*

Before an in absentia trial process that could be used in war crimes trials by the International Tribunal may be posited, the internationally accepted due process norms which apply to criminal trials in general, and to in absentia trials in particular, must be determined. Prior to World War II, international efforts at defining due process rights focused on such rights in the context of rules of procedure for an international criminal court.⁵⁰⁵ These efforts did not come to fruition, but did result in a number of draft statutes for such a tribunal.⁵⁰⁶ Some of these statutes included provisions allowing for in absentia trials,⁵⁰⁷ while others did not.⁵⁰⁸ During World War II, a number of organizations drafted statutes to be used in war crimes trials of Axis leaders. The Draft Convention for the Creation of an International Criminal Court, compiled by the London International Assembly in 1943 [hereinafter Draft Convention], provided that "[n]o accused will be tried in absentia."⁵⁰⁹ Similarly, the UNWCC's Draft Convention for Establishment of a United Nations War Crimes Court allowed an "accused person appearing for trial before the Court . . . [t]o be present during the conduct of the proceedings."⁵¹⁰

Since the end of World War II, a large number of international agreements have specifically addressed the minimum due process rights to which defendants should be entitled in criminal trials. Rather than attempt to create an international court, these agreements have instead focused on the

internationally accepted norms of due process which should apply in national courts. These rights include:

1. The presumption of innocence until proven guilty.⁵¹¹
2. A fair and impartial public hearing.⁵¹²
3. Prior detailed notification of the nature and cause of the charges in a language the defendant understands.⁵¹³
4. The assistance of an interpreter.⁵¹⁴
5. The right to counsel.⁵¹⁵
6. The examination of prosecution witnesses and the right to have defense witnesses made available.⁵¹⁶
7. The right against self-incrimination.⁵¹⁷
8. The right to an appeal.⁵¹⁸
9. No double jeopardy.⁵¹⁹
10. Adequate time and preparation for the defense.⁵²⁰
11. The right of presence of the defendant at trial.⁵²¹

The extensive overlap between these various agreements suggests that these rights are internationally accepted norms of due process, if only from the perspective of customary international law. These agreements do not detail the nature of the rights, obviously leaving the exact implementation of the rights to the respective justice systems of the various parties. The universally accepted right of presence at trial should not be seen as necessarily showing disfavor toward all types of in absentia trials by the international community, for many common-

law and civil-law countries have aspects of their judicial systems which provide for in absentia or default trials and judgments.⁵²² By assuring a new trial de novo to the accused convicted in default, the right to presence is not done away with, it is merely postponed.

There are few international agreements on the due process norms applicable to in absentia trials. One such agreement is the European Convention on the International Validity of Criminal Judgments [hereinafter ECIVCJ], which provides a mechanism for the enforcement of in absentia judgments rendered by the courts of member European states.⁵²³ An in absentia judgment is specifically defined as "any judgment rendered by a court in a Contracting State after criminal proceedings at the hearing of which the sentenced person was not personally present."⁵²⁴ A state rendering such a judgment [hereinafter "requesting state"] may then transmit this information to the state in which enforcement is sought.⁵²⁵ The state of which enforcement action is requested [hereinafter "requested state"] must then notify the sentenced person of their right to file an opposition to the enforcement action, and that failure to do so within 30 days will cause the original judgment to be considered as rendered as if the accused were present.⁵²⁶ The opposition procedure allows the accused person to file an opposition with either the requesting or the requested state.⁵²⁷

An accused requesting examination of the opposition in either the requesting state or the requested state is given

notice of a new hearing of the case at least 21 days before the new hearing.⁵²⁸ The new hearing is held before a competent court of that state, using its procedure.⁵²⁹ Failure to appear at the new hearing results in the opposition being declared null and void.⁵³⁰ An inadmissible opposition is also declared a nullity.⁵³¹ "In both cases, the judgment . . . shall . . . be considered as having been rendered after a hearing of the accused."⁵³² If the accused is present and the opposition is admitted, then the case once again proceeds to trial. Trial in the requested state renders the judgment of the requesting state null and void.⁵³³

The process set out in the ECIVCJ is similar to that used in French courts-martial default judgments.⁵³⁴ The in absentia judgment stands until the defendant affirmatively and successfully opposes it, at which time the defendant is given a new hearing.⁵³⁵ Given the large number of European countries which are either parties or signatories to the convention,⁵³⁶ one might reasonably conclude that the ECIVCJ opposition procedure, with its provisions for actual notice, a new trial de novo, and for a subsequent judgment rendering the in absentia judgment void, is a reflection of due process requirements for in absentia trials accepted by these nations.

Although it is just a proposal, the U.N. International Law Commission's Draft Statute for an International Criminal Court [hereinafter ILC Draft] evidences the degree to which in absentia trials are accepted in the international community today.⁵³⁷ The ILC Draft allows the defendant "to be present at the trial,

unless the court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate."⁵³⁸ Members of the commission in favor of in absentia trials believed "judgment[s] in absentia would [] constitute a kind of moral sanction which could contribute to the isolation of the accused wherever located and, possibly, to eventual capture."⁵³⁹ These members also believed that in absentia trials could preserve evidence which might otherwise perish, and that prejudice to the accused would be avoided by conducting a new trial de novo upon his eventual appearance.⁵⁴⁰

B. International Tribunal Personal Jurisdiction: An Evaluation

The current procedure of the International Tribunal under the Statute and the applicable rules of procedure meets the standards set out in the various international human rights agreements.⁵⁴¹ Although a trial may begin against an absent accused, a defense is not presented. In this limited sense, it is similar to the typical civil law default trial, in which no defense counsel is heard and no extenuating circumstances are considered. The essential difference between the two is the judgment which results from the default trial. Of what increased value is this judgment as compared to a simple presentation of the prosecution's evidence in terms of enforcing international human rights?

An actual judgment may prove more persuasive to a nation of whom surrender of an alleged war criminal is demanded than just evidence from the prosecution in the case. Likewise, nations

which happen to obtain personal jurisdiction over the convicted accused may find it easier politically to turn such people over to the International Tribunal if a judgment is outstanding against them rather than just a pending case. This tendency could be heightened if the absent defendant was zealously defended before the International Tribunal by an appointed defense counsel, so that the judgment could be seen as the result of a more impartial hearing. While Dr. Bergold's representation of Bormann before the IMT may not have affected the tribunal's deliberations in that case, representation might make a difference in situations in which the evidence of guilt is less overwhelming against the absent defendant. Allowing the appointed defense counsel to present a defense case in sentencing might also mitigate the in absentia sentences. This would have the salutary effect of individualizing the sentences, and prevent the International Tribunal from being criticized that it was basing its decisions on stereotypes or only half-correct information.

Like Dr. Bergold at Nürnberg, appointed defense counsel can expect no cooperation from their clients. Working with appointed defense counsel should be seen as a defendant's acquiescence on the absent defendants' part to the Tribunal's jurisdiction to try their cases. Unlike the situation at Nürnberg, however, there are still governments in either de jure or de facto power over large areas of territory in the Former Yugoslavia where evidence may be available, which perhaps have an interest in providing

exculpatory information to defense counsel. For example, it would not be surprising to find agencies in any of the constituent parts of the Former Yugoslavia that would assist the defense counsel appointed to defend alleged war criminals that resided in those areas. Further, the sheer amount of information available today from the media on automated databases might prove invaluable to absent defendants' defense counsel in case preparation.

VI. Conclusion

The creation of the International Tribunal marks an important step forward in the enforcement of international human rights. Only time will tell whether it is effective within its narrow jurisdiction of the Former Yugoslavia after January 1, 1991. The procedure to be used by the International Tribunal when it eventually tries cases will allow for the preservation of evidence of war crimes adduced in an impartial setting, but will stop short of actually reaching a judgment based upon this information. The efficacy of the International Tribunal in determining the actual facts of any case would be enhanced through the use of a civil-law style default procedure, but one in which the absent defendant is represented by court-appointed counsel entitled to present the case for the absent defendant at every stage of the proceeding. The verdicts and sentences based upon such a trial are more deserving of international approval than under a truncated procedure as in the French system, for the evidence upon which they are based is more reliable than that

adduced in the latter system. These verdicts and sentences, therefore, might prove more persuasive than either an ordinary default judgment or a presentation of evidence under the International Tribunal's hybrid process in convincing countries harboring convicted war criminals to surrender them to the International Tribunal for a new trial de novo.

1. Abner Katzer, *First War Crimes Tribunal Opens Since World War II*, THE ASSOCIATED PRESS [hereinafter A.P.], Nov. 17, 1993 (NEXIS). Actual trials are not anticipated to begin until late 1994. *U.N. War Crimes Court May Begin Trials This Year*, REUTERS, Mar. 16, 1994 (NEXIS).

2. STATUTE OF THE INTERNATIONAL TRIBUNAL [hereinafter STATUTE] art. 1, reprinted in 32 I.L.M. at 1192 (1993).

3. Ian Traynor, *War-crimes Court Takes First Faltering Steps*, THE GAZETTE (Montreal), Nov. 19, 1993 (NEXIS). As of late August, 1993, at least 200,000 people were estimated to have been killed during the on-going conflicts, and at least two million had been displaced from their homes. Peter J. Spielmann, *U.S. Ambassador: Yugoslav Sanctions To Stay If War Criminals Not Extradited*, A.P., Aug. 31, 1993 (NEXIS).

4. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, *YUGOSLAVIA: A COUNTRY STUDY* xxviii (Glenn E. Curtis, ed., 3rd ed. 1992) [hereinafter YUGOSLAVIA].

5. See *id.* at xxviii-xxix.

6. *Id.* at xxix.

7. *Id.* at xxix.

8. *Id.*

9. *Key Dates in the Yugoslavia Crisis*, A.P., May 13, 1993 (NEXIS) [hereinafter *Key Dates*].

10. See YUGOSLAVIA, *supra* note 4, at xxxi.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Rebel Serbs 'Admit Vukovar Atrocities,'* THE PRESS ASSOCIATION LIMITED, Jan. 6, 1994 (NEXIS); Julia Preston, *U.N. Moves to Create Balkan War Crimes Panel*, THE WASHINGTON POST, Feb. 19, 1993, at A24 (NEXIS). See PHYSICIANS FOR HUMAN RIGHTS, REPORT OF A PRELIMINARY SITE EXPLORATION OF A MASS GRAVE NEAR VUKOVAR, FORMER YUGOSLAVIA 27-28 (Jan. 1993) ("reservists" and JNA troops alleged to have killed approximately 200 Croatian hospital patients and buried them in a mass grave near Vukovar). See also *Serbian organization claims to have proof of Croatian MP's war crimes*, THE BRITISH BROADCASTING CORPORATION [hereinafter BBC], Feb. 3, 1994, Part 2, Central Europe and the Balkans; FORMER YUGOSLAVIA; Croatia; EE/1912/C (allegations that member of Croatian Parliament responsible for war crimes in Slavonia).

15. *Key Dates*, *supra* note 9.

16. *Id.*

17. *Id.*

18. Trevor Rowe, *U.N. Calls for Serb Camp Inspections*, THE WASHINGTON POST, Aug. 5, 1992, at A27 (NEXIS).

19. In S.C. Res. 771 (Aug. 12, 1992), reprinted in 31 I.L.M. at 1470 (1992), the U.N. Security Council "expressed grave alarm at continuing reports of widespread violations of international

humanitarian law . . . including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals, ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." In April, 1993, the Security Council again condemned all violations of international humanitarian law, particularly the practice of "ethnic cleansing (the mass forced expulsion of civilians)," and the "massive, organized and systematic detention and rape of women." S.C. Res. 820 (April 17, 1993). Allegations of war crimes committed by Bosnian Muslim and Croat forces against Serbian civilians have also been filed with the U.N. See, e.g., Letter Dated 15 March 1993 From The Charge D'Affaires A.I. Of The Permanent Mission Of Yugoslavia To The United Nations Addressed To The Secretary-General, U.N. Doc. S/25421 (1993). Bosnian Croats have also been identified as committing atrocities against Bosnian Muslims. Anthony Goodman, *U.N. Identifies Croat Extremists As Massacre Suspects*, REUTERS, Feb. 14, 1994 (NEXIS).

20. *Main Developments of Fighting in Bosnia*, A.P., Aug. 12, 1992 (NEXIS); see, e.g., HELSINKI WATCH, *WAR CRIMES IN BOSNIA-HERZEGOVINA* (1992).

21. Ian Traynor & Hella Pick, *Serbs Face New Sanctions*, THE GUARDIAN (Manchester), Aug. 28, 1992, The Home Page, at 1 (NEXIS). Interestingly, the conferees included Radovan Karadzic, the

Bosnian Serb leader. *Id.* Karadzic has been named as a major war criminal by the United States and others. Andrew Katell, *UN Setting up War Crimes Tribunal for Balkans*, A.P., Feb. 22, 1993 (NEXIS).

22. Andrew Katell, A.P., Dec. 18, 1992 (NEXIS).

23. Mark Tran, *U.N. To Set Up Commission To Investigate Atrocities in Former Yugoslavia*, THE GUARDIAN (Manchester), Oct. 7, 1992, Foreign Page, at 8 (NEXIS).

24. Lucia Mouat, *U.N. Expected to Strengthen Stand on Bosnia*, THE CHRISTIAN SCIENCE MONITOR, Dec. 14, 1992, U.S. Section, at 6 (NEXIS); Robert Block, *MP's unite in condemning Britain's record on war crime prosecutions*, THE INDEPENDENT (London), Aug. 8, 1993, Foreign News, at 14 (NEXIS).

25. *Id.*

26. James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L LAW 639, 640-42 (1993)[hereinafter O'Brien].

27. S.C. Res. 808 (Feb. 22, 1993), cited in 32 I.L.M. at 1164 (1993).

28. S.C. Res. 827 (May 25, 1993), *id.* at 1203.

29. STATUTE art. 1, *supra* note 2, at 1192.

30. *Id.* art. 2.

31. *Id.* art. 3, at 1192-93.

- 32. *Id.* art. 4, at 1193.
- 33. *Id.* art. 5.
- 34. *Id.* art. 12, at 1195.
- 35. *Id.* art. 18(1)-(3), at 1197.
- 36. *Id.* art. 18(4), at 1197-98.
- 37. *Id.* art. 19, at 1198.
- 38. *Id.* art. 20.
- 39. *Id.* art. 25(1)(a), (b), at 1199.
- 40. *Id.* art. 25(2), at 1200.
- 41. *Id.* art. 26.
- 42. *Id.* art. 21(1)-(4), at 1198-99.
- 43. STATUTE art. 21(4)(d), *supra* note 2, at 1199.
- 44. Tony Smith, *Shelling Kills At Least Seven In Sarajevo*, A.P., Jan. 15, 1993 (NEXIS).
- 45. Letter Dated 10 February 1993 From The Permanent Representative Of France To The United Nations, Addressed To The Secretary-General, U.N. Doc. S/25266 (1993)[hereinafter French Report]; see also THE WASHINGTON POST, Feb. 19, 1993, at A24 (NEXIS).
- 46. French Report, *supra* note 45, at 30.
- 47. *Id.*
- 48. *Id.*
- 49. *Id.*

50. Letter Dated 31 March 1993 From The Charge D'Affaires A.I. Of The Permanent Mission Of Canada To The United Nations Addressed To The Secretary-General, U.N. Doc. S/25504 (1993)[hereinafter Canadian Report]. See *UN to prosecute Yugoslav war crimes*, THE GAZETTE (Montreal), Feb. 23, 1993, at A1(NEXIS).

51. Canadian Report, *supra* note 50, at 20.

52. *Id.* at 21.

53. *Id.*

54. *Id.*

55. See 32 I.L.M. at 1189.

56. STATUTE art. 21(4)(d), *supra* note 2, at 1199.

Interestingly, the French panel of experts believed that the Statute should comport with the International Covenant of Civil and Political Rights, Dec. 16, 1966, U.N. GAOR, 21st Sess., Supp. No. 16 (A/6316)[hereinafter ICCPR] art. 14, French Report, *supra* note 45, at 32; while the panel sponsored by the Canadians felt "it would be unwise to simply include [] Articles 9 and 14 of the [ICCPR] in the Statute . . . since the wording could convey different meanings to persons from different legal systems." Canadian Report, *supra* note 50, at 18. As of January 31, 1993, the ICCPR had been ratified by 112 countries, including the Former Yugoslavia. French Report, *supra* note 45, at 32

57. Sabine Gillot, *Tribunal will reveal war crimes evidence*

against absent defendants, AGENCE FRANCE PRESSE, Feb. 11, 1994 (NEXIS) (interview with Justice Jorda of the International Tribunal).

58. *Id.*

59. French Report, *supra* note 29, at 30.

60. See CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL (Annexed to the London Agreement of Aug. 8, 1945) [hereinafter IMT CHARTER], reprinted in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, PROCEEDINGS [hereinafter PROCEEDINGS], OFFICIAL DOCUMENTS 10 (1947).

61. As an enforcement measure under U.N. CHARTER ch. VII, the length of its existence is "linked to the restoration and maintenance of international peace and security in the territory of the Former Yugoslavia." U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. at 1169.

62. See TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 85-90 (1992) [hereinafter TAYLOR].

63. See Patrick Quinn, *Experts Say War Crimes in Sarajevo Exist, But Prosecution Hard*, A.P., Jul. 6, 1993 (NEXIS) [hereinafter Quinn]; David Binder, *Criticized as Appeaser, Vance Defends His Role in Balkans*, THE N.Y. TIMES, Jan. 19, 1993, Section A, at 1, col. 4; Juliana Mojsilovic, *Serb Accused of War Crimes is Elected to Parliament*, A.P., Dec. 22, 1992 (NEXIS).

64. IMT CHARTER art. 12, *supra* note 60, at 458.

65. STATUTE art. 21(4)(d), *supra* note 2, at 1185.

66. Quinn, *supra* note 63.

67. *Belgrade will try own "war criminal": minister*, AGENCE FRANCE PRESSE, Mar. 7, 1994 (NEXIS)[hereinafter *Belgrade*].

68. STATUTE art. 29(2)(e), *supra* note 2, at 1189.

69. See Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), U.N. Doc. S/25704, reprinted in 32 I.L.M. at 1188 (noting that such orders will be considered an enforcement measure under U.N. CHARTER ch. VII).

70. See O'Brien, *supra* note 26, at 640-64.

71. See Guido de Bruin & Lucy Johnson, *Yugoslavia: War Crimes Tribunal's Political Role*, INTER PRESS SERVICE, May 26, 1993 (NEXIS)[hereinafter *de Bruin*]; Aryeh Neier, *Judgment in Sarajevo*, THE WASHINGTON POST, Apr. 18, 1993, Outlook Section, at C3 (NEXIS). See also Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. 122, 132-33 (1993). Germany has taken an active role in bringing law enforcement actions against suspected Serb war criminals residing there. On February 13, 1994, a Serb illegal immigrant, Dusko Tadic, was charged with complicity in genocide (mistreatment of 150 Muslim prisoners in the Omarska prison camp in Bosnia). German justice to pursue Serbian "war criminals," AGENCE FRANCE PRESSE, Mar. 6, 1994 (NEXIS). Thirty-one additional suspects were still being sought in March 1994. *Id.* "Under German law, individuals of any

nationality can be pursued for crimes that come under international law irrespective of where the alleged crimes took place. Complicity in genocide would incur a penalty of not less than five years in prison." *Id.* German prosecutors said they would proceed against suspected war criminals unless the International Tribunal demands their transfer. *Belgrade, supra* note 67.

72. Stephanie Nebehay, *U.S. Says Yugoslav Tribunal Should Be Model*, REUTERS, Aug. 30, 1993 (NEXIS).

73. See Julie Mertus (Counsel, Helsinki Watch), *In Bosnia, Airstrikes Alone Won't Do Job*, THE N.Y. TIMES, Aug. 18, 1993, § A, at 18, col. 6 (editorial); de Bruin, *supra* note 71.

74. 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 49 (10th ed., 1966) (1903) [hereinafter HOLDSWORTH].

75. "This is a principle which is common to other bodies of early Germanic law; and it perhaps founded upon the idea that recourse to a law court depends upon the consent of the parties. If the defendant has not consented to the jurisdiction by appearing, the court has no jurisdiction to try the case." *Id.*

76. *Id.*; 3 *id.* at 604 (5th ed. 1942) (1908).

77. 1 FREDERICK POLLACK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 49 (2nd ed. 1968) (1895) [hereinafter POLLACK].

78. 3 HOLDSWORTH, *supra* note 74, at 604-05.

79. *Id.*

80. *Id.* The "King's peace" was the legal name given to the normal state of society. 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 185 (1883).

81. 3 HOLDSWORTH, *supra* note 74, at 605.

82. 1 POLLACK, *supra* note 77, at 49; 3 *id.* at 449.

83. 3 *id.* at 449.

84. 2 HOLDSWORTH, *supra* note 74, at 105.

85. 3 POLLACK, *supra* note 77, at 449-50.

86. Holdsworth suggests that this "primitive rule" survived "probably due to the fact that in cases of treason or felony such [an in absentia] power was hardly necessary, for the law has always had the power to punish him in his absence by forfeiture, and to treat him as condemned if he could be captured." 3 HOLDSWORTH, *supra* note 74, at 605.

87. *Rex v. Browne*, C.C. Ct., 70 J.P. 472 (1906).

88. See *Regina v. Jones* (No. 2), C.A. Crim. Div., 2 All E.R. 731 (1972).

89. See *id.*

90. As of 1933, the constitutions of at least eighteen states specifically established the right of the accused "to appear and defend in person." *Snyder v. Massachusetts*, 291 U.S. 97, 130 n.20 (1933) (Roberts, J., dissenting). At least seven other states at that time provided for the right of presence at trial in statutory law. *Id.* at 131 n.22. The remainder either

provided the right to cross-examine and have the assistance of counsel in state constitutions or statutory law. *Id.* at 130 n.19. Numerous case law authorities affirming the right to be present are cited in *id.* at 131-32 n.23.

91. In 1784, the Supreme Court of Pennsylvania rendered an advisory opinion to the Supreme Executive Council on the propriety of the outlawry procedure which had been used in a county court against a certain Doan. *Respublica v. Doan*, 1 U.S. 86 (1 Dall. 1790). The Pennsylvania Supreme Court found the outlawry consistent with the Pennsylvania constitutional right to a jury trial, for outlawry was a judgment in itself, and the accused had waived the right by fleeing the jurisdiction and causing the county court to pronounce the outlawry against him. *Id.* at 90-91. The forfeiture of Doan's estate as a consequence of the outlawry included his life. *Id.* at 91. The court found that Doan could therefore be properly executed, and the expenses of the execution could be defrayed from his forfeited estate. *Id.* at 91-93.

92. See *Commonwealth v. Kelly*, 292 Pa. 418, 141 Atl. 246 (Penn. 1928); *Whittaker v. State*, 173 Ark. 1172, 294 S.W. 397 (Ark. 1927); *Lowman v. State*, 80 Fla. 18, 85 So. 166 (Fla. 1920).

93. See, e.g., *McCorkle v. State*, 14 Ind. 39, 45-46 (Ind. 1859); *Fight v. State*, 7 Ohio 181, 183 (Ohio 1835).

94. *Id.*

95. 110 U.S. 574 (1883).

96. *Id.* at 576-79. Under Utah procedure at the time, challenged jurors were examined by a fact-finding panel, separate from the court, to determine whether the challenges were meritorious. *Id.* at 576. At trial, the jurors were examined outside the presence of appellant and his counsel. *Id.* at 577.

97. *Id.* at 577.

98. *Id.* at 579.

99. *Id.* In *Lewis v. United States*, 146 U.S. 370 (1892), the trial court required the prosecution and defense to make their challenges to the prospective jurors independently and simultaneously, thereby in effect causing the defendant not to be present at the time the prosecution challenges were made. *Id.* at 372. The Court held that in the absence of a procedural statute, the common law rule requiring presence of the defendant controlled, and reversed the conviction. *Id.* at 377, 380.

100. 223 U.S. 442 (1912).

101. *Id.* at 445.

102. *Id.* at 453.

103. *Id.* at 455.

104. *Id.* at 459.

105. 291 U.S. 97 (1934).

106. *Id.* at 103.

107. *Id.* at 107.

108. *Id.* at 105-06.

109. *Id.* at 106. At this point in time, the concept of constitutional due process did not include the right to trial by jury or to be indicted only by a grand jury. *United States v. Gregorio*, 497 F.2d 1253, 1259 n.12 (4th Cir. 1974), cert. denied, 419 U.S. 1024 (1974).

110. *Snyder*, 291 U.S. at 108.

111. *Id.* at 122.

112. *Id.* at 137 (Roberts, J., dissenting).

113. *Id.* at 131-32.

114. 397 U.S. 337 (1969).

115. *Id.* at 339-41.

116. *Id.* at 341.

117. *Id.* at 337.

118. *Id.*

119. *Id.*

120. *Id.* at 338. Interestingly, Justice Black cited *Lewis*, 146 U.S. 370 (1892), *see supra* note 99, for this proposition. *Allen*, 397 U.S. at 338.

121. *Id.* at 342-43.

122. *Id.* at 343.

123. *Id.* at 347.

124. *See* FED. R. CRIM. P. 43, 1946 Advisory Committee Notes, ¶ 1.

125. *Id.*

126. *United States v. Gordon*, 829 F.2d 119, 123 (D.C. Cir. 1987).

127. See Pub. L. 94-64, § 3(35), 89 Stat. 376 (1975).

128. FED. R. CRIM. P. 43(a), (b).

129. See *Faretta v. California*, 422 U.S. 806, 819 n.15 (1974); *United States v. Brown*, 571 F.2d 980, 986-87 (6th Cir. 1978); *United States v. Jorgenson*, 451 F.2d 516, 521 (10th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972). But see *Gregorio*, 497 F.2d at 1259 (court takes a textual approach in interpreting the scope of the right in the context of the FED. R. CRIM. P. and the policies behind them).

130. See MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 804(b) (1984)[hereinafter MCM]; MCM, para. 11c (1951); MANUAL FOR COURTS-MARTIAL, U.S. Army, para. 10 (1928)[hereinafter MCM, U.S. Army]; MCM, U.S. Army, para. 36 (1921); MCM, U.S. Army, para. 36 (1917); MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, Sec. I(7) (Rev. ed. 1905); HENRY RAY, INSTRUCTIONS FOR COURTS-MARTIAL and JUDGE ADVOCATES 17 (1895).

131. Trial by Military Commission of H. H. Dodd, Indiana, 1864, reported in WILLIAM W. WINTHROP, WINTHROP'S MILITARY LAW AND PRECEDENTS 393 n.9 (2nd ed. 1920) (1986).

132. *Id.*

133. United States v. Houghtaling, 8 C.M.R. 30, 34-35 (C.M.A. 1953).

134. FED. R. CRIM. P. 43(b) at that time provided in pertinent part that "in prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his absence shall not prevent continuing the trial . . .," cited in *id.* at 33.

135. *Id.*

136. *Id.*

137. *Id.* at 34.

138. *Id.*

139. See *id.*

140. Federal courts operating under FED. R. CRIM. P. 43 may only go so far as to reach a verdict against an absent accused. The imposition of sentence must be in the accused's presence. See *Mayfield v. United States*, 504 F.2d 888, 889 (10th Cir. 1974).

141. Houghtaling, 8 C.M.R. at 35.

142. MCM, R.C.M. 804(b). The voluntariness of the absence must be "established on the record before trial in absentia may proceed." MCM, app. 21, A21-41.

143. FED. R. CRIM. P. Rule 43(b) 1974 Advisory Committee Notes ¶ 11.

144. ADÉHAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 62-63 (1913)[hereinafter ESMEIN]. Over time, however, the public authority acquired the right to seize suspects and offer interested parties the opportunity to bring judicial action. Such detention was called "arrest on suspicion." *Id.*

145. The French contumacy procedure was called *forbannissement*, or banishment. This action could only be taken by a court of assizes for serious offenses. *Id.* at 73.

146. *Id.* at 74.

147. *Id.* at 74.

148. *Id.* at 74. Like the Anglo-Saxon outlaw, the French outlaw lost his civil rights and his property was confiscated. *Id.* at 75.

149. *Id.*

150. *Id.*

151. The sovereign could issue letters of recall, which allowed for either a new judicial action or a pardon. *Id.* at 76. The imposition of outlawry could also be attacked judicially if the defendant appeared in court within forty days of its pronouncement. *Id.* at 77.

152. *Id.* at 78-144.

153. *Id.*

154. See *id.* Similarly, these same factors combined to increase the power of the Italian medieval courts over

contumacious defendants. CARLO CALISSE, A HISTORY OF ITALIAN LAW 97-98 (Layton B. Register, trans., 1928).

155. ESMEIN, *supra* note 144, at 164. In the defendant's favor, however, the appearance of the defendant in court began to be seen as nullifying the original judgment. *Id.* at 165.

156. *Id.* at 143, 156-57.

157. *Id.* at 143.

158. *Id.* at 244.

159. The contumacy provisions of the current CODE DE PROCÉDURE PÉNAL (Code of Criminal Procedure)[hereinafter C. PR. PÉN.] are based on those found in the CODE D'INSTRUCTION CRIMINELLE (Code of Criminal Examination) of 1808, compare 29 AMERICAN SERIES FOREIGN PENAL CODES, THE FRENCH CODE OF CRIMINAL PROCEDURE (Gerald L. Kock & Richard S. Frase, trans., rev. ed. 1988)[hereinafter FRENCH CODE] with FRANCE: PENAL CODE & CODE OF CRIMINAL PROCEDURE (J. Fergus Belanger, trans., 1957) [hereinafter PENAL CODE]; which themselves are little changed from those found in the Ordinance of 1670. ESMEIN, *supra* note 144, at 515.

160. ESMEIN, *supra* note 144, at 244.

161. *Id.*

162. *Id.*

163. Confirmation is a civil law process in which the judge examines witnesses under oath to insure they "confirm" their prior depositions given to the examining magistrate or judge

during the preliminary examination. *Id.* at 153-54. In a civil law system, the preliminary examination of a case is of crucial importance, for it is where the facts of the case are chiefly developed. *Id.* at 409.

164. Confrontation is a civil law process whereby the accused is allowed to make objections to witnesses' testimony after they have been confirmed. *Id.* at 154.

165. *Id.* at 244.

166. *Id.* at 244.

167. *Id.* at 245.

168. *Id.*

169. *Id.*

170. *Id.* at 245.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 408-18.

175. *Id.* at 426.

176. *Id.* at 460-61, 469.

177. *Id.* at 515.

178. PENAL CODE, *supra* note 159.

179. FRENCH CODE, *supra* note 159, at 2.

180. C. PR. PÉN. art. 79, *id.* at 79.

181. C. PR. PÉN. art. 181, *id.* at 122.

182. C. PR. PÉN. arts. 191-218, *id.* at 126-34.

183. C. PR. PÉN.. arts. 211-212, *id.* at 132.

184. C. PR. PÉN. arts. 248, 296, *id.* at 144, 159.

185. *Id.* at 2-3.

186. C. PR. PÉN. art. 359, *id.* at 175.

187. An accused charged with a lesser criminal offense, such as a contravention or a delict, is tried in the lower courts of first instance; and may be tried in absentia if he received proper notice and fails to appear. C. PR. PÉN. art. 410, *id.* at 194; *id.* at 21.

188. C. PR. PÉN. art. 319, *id.* at 165. An accused may be forcibly brought into a courtroom. C. PR. PÉN. art. 320, *id.*

189. C. PR. PÉN. art. 322, *id.*

190. *Id.* at 26-27.

191. C. PR. PÉN. arts. 412, 627(1), *id.* at 195, 271. An accused charged with an offense punishable by a fine or less than two years' imprisonment may waive appearance upon proper application to the court, and still be represented by counsel. C. PR. Pén. art. 411(1), *id.* at 195.

192. C. PR. PÉN. art. 632, *id.* at 272; *id.* at 8, 27.

193. C. PR. PÉN. art. 630, *id.* at 272.

194. C. PR. PÉN. art. 632, *id.*

195. C. PR. PÉN. art. 633, *id.*

196. C. PR. PÉN. art. 627, *id.*

197. Separate limitation periods govern the time within which an adjudged sentence can be executed, depending upon the seriousness of the offense. For felonies, the time limit is twenty years. C. PR. PÉN. art. 763(1), *id.* at 359.

198. C. PR. PÉN. art. 639, *id.* at 274.

199. C. PR. PÉN. art. 640, *id.*

200. The current military and civilian default procedures differ little from that which was used in the Imperial French Army. See CODE DE JUSTICE MILITAIRE POUR L'ARMÉE arts. 175-78 (1857).

201. DALLOZ, CODE DE JUSTICE MILITAIRE arts. 286-89 (J. Pradel & F. Casorla, eds. 1992)[hereinafter C. JUS. MIL.]. The ten day period is shortened to five days in time of war. *Id.* art. 287.

202. *Id.* art. 291.

203. *Id.*

204. C. PR. PÉN. art. 639, FRENCH CODE, *supra* note 159, at 274.

205. C. JUS. MIL. arts. 294-97, *supra* note 201.

206. *Id.*

207. See *id.*

208. Joseph M. Snee & A. Kenneth Pye, *Due Process In Criminal Procedure: A Comparison Of Two Systems*, 21 OHIO ST. L. J. 467, 487-88 (1960).

209. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 128-29 (1949)[hereinafter FINAL REPORT]. In the St. James Declaration, the first joint Allied statement on war crimes trials, several of the Allies agreed to take action "through the channel of organized justice" against those "handed over to justice." INTER-ALLIED INFORMATION COMMITTEE, PUNISHMENT FOR WAR CRIMES: THE INTER-ALLIED DECLARATION SIGNED AT ST. JAMES'S PALACE, LONDON 13TH JANUARY 1942 3-4 (1942).

210. BRADLEY SMITH, THE ROAD TO NUREMBERG [hereinafter SMITH] 190, 218-19 (1981).

211. BRADLEY SMITH, REACHING JUDGMENT AT NUREMBERG 44 (1977) [hereinafter REACHING JUDGMENT].

212. SMITH, *supra* note 210, at 195.

213. *Id.* at 195, 207.

214. *Id.* at 209.

215. *Id.* at 211.

216. *Id.* at 213, 222.

217. *Id.* at 216.

218. See *supra* text accompanying notes 90-113.

219. In a memorandum to President Roosevelt dealing with the trial and punishment of the major Nazi war criminals, the Secretaries of State and War and the Attorney General argued for war crimes trials. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, reprinted in 1 BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT 438 (1980)[hereinafter FERENCZ]. These officials believed that "[c]ondemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi war crimes and criminality." *Id.* The memorandum only envisioned trying and sentencing "those individual defendants physically before" the court. *Id.* at 439.

220. SMITH, *supra* note 210, at 217.

221. *Id.* Regardless of whether the lack of hard evidence as to Hitler's whereabouts at the time of the drafting of the memorandum was the impetus behind the in absentia provision, Justice Jackson was not inclined to import American constitutional considerations into the IMT's procedure. In his June, 1945 report to President Truman, Justice Jackson stated

[t]hese hearings, however, must not be regarded in the same light as a trial under our system, where defense is a matter of

constitutional right. Fair hearings for the accused are, of course, required to make sure that we punish only the right men for the right reasons. But the procedure of these hearings may properly bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials.

TRIAL OF WAR CRIMINALS, DEP'T STATE PUB. 2420, 1945, at 3.

222. Para. 12b, Executive Agreement, reprinted in INTERNATIONAL CONFERENCE ON MILITARY TRIALS, DEP'T STATE PUB. 3080, 1949 [hereinafter INTERNATIONAL CONFERENCE], at 23.

223. *Id.* at 243-45.

224. A British proposal to amend the Executive Agreement did not include any suggested changes to the provision allowing in absentia trials. Memorandum of May 28, 1945, reprinted in *id.* at 40. On June 3, 1945, the British Embassy informed the State Department that "His Majesty's Government have now accepted in principle the United States draft as a basis for discussion . . . to prepare for the prosecution of war criminals." Aide-Mémoire from the United Kingdom, June 3, 1945, reprinted in *id.* at 41. Similarly, the Soviet Government stated that it "agree[d] with the outline in its principles and consider[ed] it possible to accept it as a basis," and suggested certain changes which did not affect the in absentia provision. Aide-Mémoire from the

United Soviet Socialist Republics, June 14, 1945, reprinted in *id.* at 61.

225. Article 33, Soviet Draft, reprinted in *id.* at 183. This language tracks that found in the in absentia trial provisions of the CODE OF CRIMINAL PROCEDURE OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC (RSFSR) arts. 231, 246-47, 257, H. BERMAN & J. SPINDLER, SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES [hereinafter RSFSR CODES] 347, 352, 357 (1966). Presumably, this language would place the burden of proving that the defendant was hiding or avoiding jurisdiction on the prosecution, and the in absentia trial procedure would only be used against the truly contumacious defendant rather than those who may have received no notice of the trial, official or otherwise.

226. Article 13, British Redraft, reprinted in INTERNATIONAL CONFERENCE, *supra* note 222, at 424.

227. CHARTER art. 12, *supra* note 44, at 12. In implementing this provision, the IMT was also given the power to "deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges." *Id.* art. 18, at 14. Under the Rules of Procedure of the IMT, adopted October 29, 1945, the IMT reserved the power to "designate counsel for any defendant who fail[ed] to apply for a particular counsel." *Id.* rule 2(d), at 19.

228. REACHING Judgment, *supra* note 211, at 229.

229. *Id.*

230. *Id.* at 230.

231. *Id.* As a procedural matter, no plea was entered on Bormann's behalf at the beginning of trial. 2 PROCEEDINGS, 14 NOVEMBER 1945 -- 30 NOVEMBER 1945 (1947), *supra* note 60, at 97-98.

232. See 14 PROCEEDINGS, 16 MAY 1946 -- 28 MAY 1946, *supra* note 60, at 569 (1948); 17 PROCEEDINGS, 25 JUNE -- 8 JULY 1946, *supra* note 60, at 247 (1948) While discussing the need for certain documents requested by the defense, Dr. Bergold described the problems he was having in preparing a defense:

. . . I am in an especially difficult situation. I have questioned many witnesses and have tried very hard, but I can find nothing exonerating. All the witnesses are filled with great hatred toward the Defendant Bormann, and they want to incriminate him in order to exonerate themselves. That makes my case especially difficult.

14 PROCEEDINGS, 16 MAY 1946 -- 28 MAY, *supra* note 60, at 569.

233. *Id.* at 568.

234. 19 PROCEEDINGS, 19 JULY 1946 -- 29 JULY 1946, *supra* note 60, at 112 (1948).

235. *Id.* at 113.

236. *Id.* at 116. When it became clear that Gustav Krupp would be unable to attend the hearings without jeopardizing his precarious health, the Americans, the British, and initially the French, opposed his counsel's motion to sever his case from the trial and suggested that he be tried in absentia. TAYLOR, *supra* note 62, at 154-56. The defense motion was granted. *Id.* at 157.

237. PROCEEDINGS, 19 JULY 1946 -- 29 JULY 1946, *supra* note 60, at 116-17.

238. *Id.* at 124.

239. 1 PROCEEDINGS, OFFICIAL DOCUMENTS, *supra* note 60, at 340-41.

240. *Id.* at 341.

241. See, e.g., Louis R. Beres, *Toward Prosecution of Iraqi Crimes Under International Law: Jurisprudential Foundations and Jurisdictional Choices*, 22 CAL. W. INT'L L. J. 127, 129 (1991).

242. Telford Taylor, a member of the American prosecution team at Nürnberg who eventually became chief counsel for the subsequent trials, has criticized Bormann's trial as follows:

The aimless discussions of Bormann's state of health should have been dealt with summarily, as was done eventually in the Gustav Krupp case, by suspending the indictment until the

defendant recovered or was found or proven dead. To utilize Article 12 in order to base a judgment of death against Bormann was wholly unnecessary and undignified.

TAYLOR, *supra* note 62, at 630. The lack of an appeal right or the right to a new trial de novo as under the civil law also undermine arguments for the legitimacy of the IMT's Article 12 in absentia procedure.

243. Twelve additional war crimes trials were held at Nürnberg between 1946 and 1949. FINAL REPORT, *supra* note 209, at 125. The basic procedure in these trials was governed by Ordinance No. 7, Military Government of Germany, United States Zone, reprinted in 1 FERENCZ, *supra* note 219, at 488. Ordinance No. 7 provided that "[e]very defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the tribunal the defendant's interests will not thereby be impaired, and except [in cases of contumacy]." Ordinance No. 7 art. IV(d), *id.* at 495. United States military commissions or specially appointed military courts conducted hundreds of other war crimes trials, generally at Dachau. Maximillian Koessler, *American War Crimes Trials In Europe*, 39 GEORGETOWN L. J. 18, 25 (1950). In practice before these tribunals, a temporary absence was found to not impair a defendant's interests so long as he was represented

by counsel. C.E. STRAIGHT, REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, EUROPEAN COMMAND 69 (1948).

244. Certain writers have argued in the context of war crimes trials that individuals who had "ample opportunity" to observe commission of crimes over extended periods of time, like concentration camp prisoners, "have been able to give accurate descriptions and make positive identifications many years after the crimes." Debra Nesselson & Steven Lubet, *Eyewitness Identification in War Crimes Trials*, 2 CARDOZO L. REV. 71, 89 (1980). As the recent trial of John Demjanjuk in Israel on charges of genocide and brutality to Jewish death camp inmates in World War II shows, eyewitness identification based upon a significant opportunity to observe the culprit is vulnerable to suggestion and perceptual distortion. See David Hoffman, *Israeli High Court Acquits Demjanjuk of War Crimes*, THE WASHINGTON POST, July 30, 1993, at A1, col. 1; Fredric Dannen, *How Terrible Is Ivan?*, VANITY FAIR, June 1992, at 176.

245. RUSSELL PEACE FOUNDATION, AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 6 (John Duffet, ed. 1968) [hereinafter RUSSELL TRIBUNAL].

246. *Id.* at 20, 27-28.

247. *Id.* at 51, 312.

248. *Id.* at 17. Other members included Carl Oglesby, former president of the Students for a Democratic Society, and

Stokely Carmichael, Chairman of the Student Non-Violent Coordinating Committee. *Id.* at 17.

249. *Id.* at 8.

250. The United States government ignored requests to send a representative to set forth its position before the tribunal. *Id.* at 9.

251. The U.S. was found guilty of committing aggression, specific war crimes such as abuse of prisoners and civilians, and genocide. *Id.* at 302, 650.

252. *Id.* at 52, 136. The report of the Japanese investigative team included a tape recorded confession by an American aviator, Lieutenant Commander Charles Tanner, that he was ordered to "first destroy dwellings by bombs, then burn out shelters by napalm, and then kill or wound with [cluster bombs] all the people who would be driven out of their shelters by the napalm." *Id.* at 163. This statement was taken in Hanoi where Tanner was being held prisoner. *Id.* Evidence of perhaps a more reliable nature came from the testimony of three former American soldiers who testified before the tribunal. The three gave detailed accounts of torture and murder of certain captured North Vietnamese and Viet Cong soldiers by American soldiers or South Vietnamese troops under U.S. command or direction. *Id.* at 404, 405-06, 426-27, 429-30, and 476.

253. See *id.* at 56-84, 98, and 115.

254. *Id.* at 67.

255. *Id.* at 7. In his invitation to U.S. President Johnson to appear before the tribunal and defend himself, Russell stated

[w]ithin living memory only the Nazis could be said to have exceeded in brutality the war waged by your Administration against the people of Vietnam, and it is because this war is loathed and condemned by the vast majority of mankind that demands are heard throughout the world for a formal international tribunal to hear the full evidence.

Letter of Aug. 28, 1966, reprinted in H.A. DeWeerd, Lord Russell's War Crimes Tribunal 9 (Mar. 1967) (on file with the U.S. Army War College) [hereinafter DeWeerd].

256. DeWeerd, *supra* note 255, at 9. Ralph Schoenman, Lord Russell's secretary and assistant, *id.* at 8, argued that "as for the crimes of the Viet Cong, we would no more regard the Vietnamese resistance a crime than we would the rising in the Warsaw Ghetto." RUSSELL TRIBUNAL, *supra* note 245, at 9.

257. DeWeerd, *supra* note 255, at 12. Lord Russell's reaction to this criticism was to suggest "that those who raise procedural points in objecting to the International War Crimes Tribunal would be better occupied in assessing their own responsibility for the horrendous acts against the people of

Vietnam." Letter to THE N.Y. TIMES, Oct. 6, 1966, quoted in *id.* at 13.

258. Six months after the tribunal issued its "verdicts," the My Lai massacres occurred in South Vietnam. *United States v. Calley*, 48 C.M.R. 19 (C.M.A. 1973). Query whether the U.S. government would have given credence to the testimony of the former American soldiers at the tribunal as to similar crimes had the testimony been adduced at an impartial hearing, and would have taken steps to prevent or lessen the possibility of such crimes in the future.

259. Treaty of Versailles arts. 227-30, June 28, 1919, reprinted in 1 THE LAW OF WAR 431-33 (Leon Friedman, ed. 1972).

260. JAMES WILLIS, PROLOGUE TO NUREMBERG 114-115 (1982) [hereinafter WILLIS]. German public opinion was also concerned with the fate of alleged Allied war criminals. *Id.* at 127. See *Imperial and Foreign News Items*, THE TIMES (London), Feb. 28, 1920, at 15, col. f (German generals and admirals refused to be tried in foreign courts); *The German Refusal; No Surrender Of War Criminals*, THE TIMES (London), Feb. 6, 1920, at 12, col. d.

261. WILLIS, *supra* note 260, at 114-15.

262. *Id.* at 130-32.

263. ROBERT WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 34 (1962) [hereinafter WOETZEL].

264. *Id.*; WILLIS, *supra* note 260, at 132-40.

265. WILLIS, *supra* note 260, at 142. The German government had already announced in the spring of 1922 that it would not surrender any accused to the Allies for trial. *Id.* at 141.

266. WOETZEL, *supra* note 263, at 34. For example, in early 1919, Hermann Röchling, a member of an important Saar industrial family, was tried in absentia at Amiens. Röchling was sentenced to ten years' imprisonment and a ten million franc fine. WILLIS, *supra* note 260, at 142. After World War II, Hermann Röchling was court-martialed in the French Zone of Occupation in Germany for his role in organizing the French steel industry in the Moselle area to support the Nazi war armaments program, allowing inhumane punishment of slave workers in his plants, and for personally profiting from the "economic plunder" of the occupied countries' steel industries. William W. Bishop, *Judicial Decisions*, 43 AM. J. INT'L L. 191, 191-92 (1949). Age 73 at the time, he was sentenced to seven years' imprisonment. *Id.* at 191.

267. WILLIS, *supra* note 260, at 142; see *Trial of German War Criminals*, THE TIMES (London), Aug. 9, 1922, at 7, col. e. In March, 1923, two alleged war criminals were seized by French authorities in their zone of occupation in Germany. *Seize U-Boat Chief Who Sank Sussex*, THE N.Y. TIMES, Mar. 28, at 21, col. 5.

268. WILLIS, *supra* note 260, at 144.

269. *Id.* at 144.

270. *Id.*

271. *Id.* at 144. In a compromise, the Germans agreed not to send Hermann Röchling, see *supra* note 249, and the French agreed not to arrest any German delegates. *Id.*

272. *Id.* at 142-45. In July, 1923, the French government presented Germany with thirty-six requests for assistance in obtaining evidence to be used in these trials. *Id.* at 143.

273. *Id.* at 145.

274. *Id.* at 142.

275. *Id.* at 142, 145.

276. See ESMEIN, *supra* note 44, at 145. See also CODE D'INSTRUCTION CRIMINELLE arts. 465-78, reprinted in JEAN SERVAIS & E. MECHERYNCK, LES CODES ET LES LOIS SPÉCIALES LES PLUS USUELLES 206-07 (29th ed. 1957) (Belg.).

277. WILLIS, *supra* note 260, at 151-52.

278. As a result of the Austro-Hungarian and Bulgarian occupation Serbia lost about 850,000 people, a quarter of its population, and about half of its pre-war resources. YUGOSLAVIA, *supra* note 4, at 28. Montenegro lost approximately a quarter of its population as well, and several hundred Croats and Slovenes were also killed. *Id.* Bulgaria claimed to have court-martialed 534 people by October 1920 for war crimes, a claim Yugoslavia disbelieved. WILLIS, *supra* note 260, at 153. When Yugoslavia refused to repatriate approximately a dozen Bulgarian soldiers

who had been tried in Yugoslavia and sentenced to death for war crimes, Bulgaria agreed to expedite its war crimes trials process. *Id.* A number of accused involved in the occupation were then arrested and tried. *Id.*

279. *Bulgars Arrest Ex-Chiefs*, THE N.Y. TIMES, Nov. 9, 1919, at 5, col. 7.

280. WILLIS, *supra* note 260, at 153.

281. *Id.*

282. *Id.* at 152.

283. *Long Trial Ages Ex-Bulgar Cabinet*, THE N.Y. TIMES, Aug. 23, 1922, at 17, col. 7 [hereinafter *Long Trial*].

284. WILLIS, *supra* note 260, at 152.

285. *Id.* at 152; *Long Trial*, *supra* note 283. The People's Judges were described by one reporter as "mostly peasants in rough dress, without collars, and unkempt." *Id.*

286. *Id.*

287. WILLIS, *supra* note 260, at 152.

288. *Six War Ministers Sentenced In Sofia*, THE N.Y. TIMES, Apr. 2, 1923, at 2, col. 7 [hereinafter *Six Sentenced*]. By this time, at least one defendant had already died in prison. *Long Trial*, *supra* note 283. Apparently frustrated with the pace of the Radoslavov trials, the Agrarian Party government devised a new trial method: Referendum. In a referendum held on Nov. 19, 1922, 75% of the voters found twenty-two former cabinet members

(exclusive of Radoslavov officials) guilty of "embroiling Bulgaria in war without sufficient diplomatic preparation." *Voters Convict Ministers*, THE N.Y. TIMES, Nov. 22, 1922, at 44, col. 3.

289. *Six Sentenced*, *supra* note 288.

290. *Id.*

291. WILLIS, *supra* note 260, at 153-54.

292. *Id.* at 162.

293. *Id.* at 154.

294. *Id.* at 155.

295. *Id.* at 155.

296. *Turkey Condemns Its War Leaders*, THE N.Y. TIMES, Jul. 13, 1919, at 1, col. 2 [hereinafter *War Leaders*]. Other officials who escaped to Germany and had to be tried in absentia included Dr. Behaeddin Shakir Bey, director of the deportation squads, and Aziz Bey, head of public security. WILLIS, *supra* note 260, at 155.

297. *War Leaders*, *supra* note 296.

298. WILLIS, *supra* note 260, at 155.

299. *Id.*; see also *Turks Issue A Black Book*, THE N.Y. TIMES, May 11, 1921, at 1, col. 1.

300. WILLIS, *supra* note 260, at 155.

301. *Id.*

302. *Id.*

303. *Id.*

304. *War Leaders*, *supra* note 296. The trial of officials accused of atrocities against Armenians at Trebizond resumed on July 12, 1919. *Enver Sentenced To Death*, THE TIMES (London), Jul. 14, 1919, at 11, col. b.

305. *War Leaders*, *supra* note 296. The sentences were confirmed, presumably by the Sultan, on July 19, 1919. *Turk General Outlawed*, THE TIMES (London), Jul. 19, 1919, at 13, col. d.

306. *War Leaders*, *supra* note 296.

307. *Turks To Ask Allies To Let Them Extradite Enver Pasha*, THE N.Y. TIMES, Jul. 16, 1919, at 1, col. 2.

308. See WILLIS, *supra* note 260, at 156.

309. *Id.* at 156. At the beginning of March, 1920, Azerbaijan refused a British request to surrender two alleged Turkish war criminals. *Rebuff to British Diplomacy*, THE TIMES (London), Mar. 3, 1920, at 15, col. c.

310. *Turks In Thrace Defy the Allies*, THE N.Y. TIMES, Mar. 19, 1920, at 1, col. 4.

311. *Id.*

312. WILLIS, *supra* note 260, at 159.

313. *Id.*

314. *Kemal Condemned To Death*, THE N.Y. TIMES, May 15, 1920, at 17, col. 2. Kemal had already been declared an outlaw by the royal government in July, 1919. *Turk General Outlawed*, THE TIMES (London), Jul. 19, 1919, at 13, col. d.

315. *New Turkish Demands For Peace Reported*, THE N.Y. TIMES, Jul. 16, 1920, at 17, col. 7.

316. WILLIS, *supra* note 260, at 160, 162.

317. *Id.*

318. UNITED NATIONS WAR CRIMES COMMISSION [hereinafter UNWCC], HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION [hereinafter UNWCC HISTORY] 45 (1948).

319. Ordinance of August 28, 1944, art. 1, reprinted in UNWCC, 3 LAW REPORTS OF TRIALS OF WAR CRIMINALS, [hereinafter LAW REPORTS] 93 (1948).

320. Ordinance of August 28, 1944, art. 6, reprinted in *id.*

321. See Allied Control Council Law No. 10, 3 Official Gazette of the Control Council for Germany 50 (1946).

322. 3 LAW REPORTS, *supra* note 319, at 100.

323. *Id.* at 102, citing Ordinance No. 20 art. 1, November 25, 1945.

324. *Id.* at 101-02, citing Ordinance of February 25, 1946, art. 1. Beyond its participation in the Tokyo Trials, France tried no war crimes cases in Japan proper. PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL 205-06 (1979) [hereinafter PICCIGALLO].

325. 3 LAW REPORTS, *supra* note 319, at 94.

326. *Id.*

327. See *id.* at 97-98 (describing the court-martial trial process in detail). Defense counsel were appointed in cases in which the defendant did not select counsel. *Id.*

328. *Id.* at 23.

329. *Id.* at 27.

330. *Id.* at 38.

331. *Id.* at 27.

332. *Id.* at 31.

333. *Die Geheime Staatspolizei* (Secret State Police); composed of the various political police forces of the German *Länder* (federal states). 1 PROCEEDINGS, OFFICIAL DOCUMENTS, *supra* note 60, at 262.

334. *Der Sicherheitsdienst des Reichsführer SS* (SS Security Service); originally the SS's intelligence agency, it was joined to the Gestapo on June 26, 1936. *Id.*

335. 3 LAW REPORTS, *supra* note 319, at 31.

336. *Id.* at 32. Much of the evidence against Huber was provided by the unsuccessful defense counsel in the Ballersdorf trial. *Id.* at 35.

337. *Id.* at 42.

338. *Id.* at 23. Appeal is unavailable to a contumacious

defendant in the French legal system. C. PR. PÉN. art. 636, translated in FRENCH CODE, *supra* note 159, at 195.

339. 8 LAW REPORTS, *supra* note 319, at 22 (1949).

340. *Id.*

341. *Id.* at 26.

342. *Id.* at 22-23.

343. *Id.* at 23-26.

344. *Id.* at 26.

345. *Id.* In the French legal system, extenuating circumstances are not considered in the trial of a contumacious defendant. C. PR. PÉN. art. 632, translated in FRENCH CODE, *supra* note 159, at 194.

346. 7 LAW REPORTS, *supra* note 303, at 67 (1948).

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Die Schutzstaffeln der National Sozialistischen Deutschen Arbeiter Partei* (Protective Staff of the Nazi Party) was originally a Nazi Party internal security unit, which grew over time to include a large number of military units. By the end of World War II, approximately 580,000 men served in forty

divisions of the *Waffen* (Armed) SS. 1 PROCEEDINGS, OFFICIAL DOCUMENTS, *supra* note 60, at 268.

353. See MAX HASTINGS, *DAS REICH: THE MARCH OF THE 2ND PANZER DIVISION THROUGH FRANCE* [hereinafter HASTINGS] (1981).

354. *Massacre in French Village; Former S.S. Men on Trial*, THE TIMES (London), Jan. 13, at 5, col. a.

355. *Trial of Alsatians; Joint Responsibility with SS Alleged*, THE TIMES (London), Jan. 2, 1953, at 5, col. c.

356. *Id.*

357. *Id.*

358. *Massacre At Oradour; General's Extradition Sought By France*, THE TIMES (London), Jan. 31, 1953, at 5, col. g. The French had not known Lammerding's exact location until he sent a letter of encouragement to one of the defendants in French custody. *Id.*

359. *War Criminals In British Zone*, THE TIMES (London), Jan. 31, 1953, at 5, col. g.

360. *Extradition Of Lammerding; Anglo-French Talks*, THE TIMES, Feb. 3, 1953, at 7, col. b [hereinafter *Lammerding*].

361. *Massacre At Oradour; General's Extradition Sought By France*, THE TIMES (London), Jan. 31, 1953, at 5, col. g.

362. See *Lammerding*, *supra* note 360.

363. In 1948, the British Military Governor of the British Occupation Zone promulgated the policy that requests for the

surrender of alleged war criminals received after September 1, 1948 "would be sanctioned only in the case of a person against whom a clear *prima facie* case of murder, as defined by the German Penal Code, was made out." *War Criminals In British Zone*, THE TIMES (London), Jan. 31, 1953, at 5, col. g. This policy was reaffirmed by the Parliamentary Under-Secretary of State for Foreign Affairs, Lord Henderson, in May, 1949. *Lammerding*, *supra* note 360. The extradition requirements were also tightened, for applicants also had to include a "satisfactory explanation" why the request had not been made before. *Id.* The Americans had already instituted similar procedures in 1947, apparently to prevent Soviet Bloc countries from conducting trials which seemed politically motivated and procedurally unfair. BRENDAN MURPHY, THE BUTCHER OF LYON 254 (1983)[hereinafter MURPHY]. Unofficial American reluctance to hand over alleged war criminals to Soviet Bloc countries appears to have begun as early as October, 1946. HISTORY OF THE UNWCC, *supra* note 318, at 423.

364. *Warrant Issued For Lammerding*, THE TIMES (London), Feb. 27, 1953, at 7, col. e.

365. HASTINGS, *supra* note 353, at 233.

366. *Appeals Lodged; Five To Two Voting By Court*, THE TIMES (London), Feb. 14, 1953, at 5, col. b.

367. HASTINGS, *supra* note 353, at 230.

368. *See Oradour Trial; Germans Separated From Alsatians*, THE TIMES (London), Feb. 5, 1953, at 5, col. g.

369. *Id.* The politically charged atmosphere of the Alsations' trials allowed the presentation of victim-impact testimony for the defense which appears unique in reported war crimes trials. A Mme. Neumayer, who had lost both a brother and a sister at Oradour, testified that when she "learned that there were some forcibly enlisted men at Oradour, [she] was deeply grieved, but [her] innermost reaction was to pity them. They, too, were victims of the Hitler regime, and [she could not] regard them as responsible for the crime." *Id.*

370. *Germans' Plea In Oradour Case; Superior Orders As Defence*, THE TIMES (London), Feb. 7, 1953, at 5, col. g.

371. *Id.*

372. HASTINGS, *supra* note 353, at 230.

373. *Oradour Sentences Questioned; Indignation in Alsace*, THE TIMES (London), Feb. 14, 1953, at 5, col. b.; *Oradour Sentences; Death Penalty On Two N.C.O.'s*, THE TIMES (London), Feb. 13, 1953, at 6, col. e.

374. *Id.*

375. *Id.* Of the Alsations, only Sergeant George Boos was condemned to death. Unlike the other Alsations he had apparently volunteered for duty with the SS. *Id.* Lammerding was not adversely affected by his death sentences. After the efforts to arrest him abated, he returned to his engineering firm in Düsseldorf and prospered until his death in 1971. HASTINGS, *supra* note 353, at 233.

376. Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L. J. 1321, 1325 (1989) [hereinafter Binder]. Approximately 4,000 people were executed on his orders, and another 7,500 were deported to German death camps. *Id.*

377. MURPHY, *supra* note 360, at 245.

378. *Id.*

379. *Id.* In fact, Moulin died shortly after the savage beatings he received from Barbie during the latter's personal interrogations of the Resistance leader. *Id.* at 198.

380. *Id.* at 250.

381. *Id.* at 250.

382. *Id.* at 254.

383. *Id.* at 307.

384. Binder, *supra* note 376, at 1326.

385. *Id.*

386. *Id.*

387. *Id.* at 1327. Barbie was also charged with torturing one Jewish Resistance member to death. *Id.*

388. *Id.* at 1327-28.

389. *Id.* at 1355; A.P., *Touvier listens in silence as 48-page account of atrocities is read to court*, THE JERUSALEM POST, Mar. 20, 1994, at 3 (NEXIS).

390. Binder, *supra* note 376, at 1328.

391. PICCIGALLO, *supra* note 324, at 202.

392. *Id.* at 205 n.14.

393. *Id.* at 205. Compare, e.g., the detailed coverage of a French trial of German doctors at Metz in 1952, *Tests On Human Beings; German Doctors On Trial*, THE TIMES (London), Dec. 18, 1952, at 5, col. a.; with the pithy report of a trial in Vietnam in 1951: "A French firing squad in Saigon yesterday executed four former Japanese Army officers who were condemned to death for the murder of 600 French and Vietnamese prisoners of war." *Japanese Executed*, THE TIMES (London), Mar. 20, 1951, at 3, col.e.

394. PICCIGALLO, *supra* note 324, at 208.

395. *Id.*

396. ADALBERT RÜCKERL, *THE INVESTIGATION OF NAZI CRIMES*, 1945-1978 29 (1980)[hereinafter RÜCKERL], cites a figure of 2,107 German defendants convicted in the French Zone. According to statistics received by one writer from the French Embassy in London, however, 2,107 Germans were tried and 1,703 were convicted. F.H. MAUGHAM, *U.N.O. AND WAR CRIMES* 24 (1951).

397. RÜCKERL, *supra* note 396, at 29.

398. See *supra* text accompanying notes 338, 345, 375.

399. DIE WELT, July 10, 1974, at 13, quoted and translated in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 277 (George Ginsburgs & V.N. Kudriavtsev, eds., 1990)[hereinafter Ginsburgs].

400. *Id.* at 277.
401. HASTINGS, *supra* note 353, at 233.
402. Ginsburgs, *supra* note 399, at 277-78.
403. *Id.*
404. *Id.* at 280.
405. *Id.*
406. NEUE JUSTIZ, No. 11, at 332 (1971), *cited in id.* at 280.
407. *See supra* text accompanying notes 370-71.
408. GEORGE CREEL, WAR CRIMINALS AND PUNISHMENT 156-57 (1944).
409. *Id.* at 157.
410. *Id.* at 158. The Danish Resistance may have had a similar procedure. *Id.* at 159.
411. Official Gazette No. 4 (Sep. 13, 1944), *cited in* 3 LAW REPORTS, *supra* note 319, at 82.
412. *Id.*
413. *Id.*
414. *Id.* at 83.
415. Decree of October 17, 1946, Gazette No. 59, *cited in id.* at 97.
416. *Id.* at 92.
417. *Id.*
418. *Id.*

419. *Id.* at 95.

420. Official Gazette No. 5, cited in *id.* at 97.

421. Art. 13, Decree of October 17, 1946, reprinted in 7 LAW REPORTS, *supra* note 319, at 94.

422. Art. 13(1), *id.* at 94 n.1.

423. Art. 13(2), *id.* at 94.

424. "It was projected that the tribunal would hear the cases of E. von dem Bach and H. Reinefahrt, involving crimes committed during the Warsaw Uprising. However, these trials did not take place because the criminals were not surrendered to Poland." Ginsburgs, *supra* note 399, at 282. But see Marian Muzkat, *Extradition of Persons Wanted or Sentenced for War Crimes*, 2 PANSTWO I PRAWO 7 (Feb., 1947) (English summary suggests in absentia trials may have been conducted).

425. See HISTORY OF THE UNWCC, *supra* note 318, at 536-41.

426. KONST. USSR art. 73 (1977, amended 1981), translated in BASIC DOCUMENTS OF THE SOVIET LEGAL SYSTEM 16 (W. Butler, trans. & ed. 1983) [hereinafter BASIC DOCUMENTS].

427. See RSFSR CODES, *supra* note 225, at 19-22.

428. *Id.*; Benjamin Sims, *Soviet Military Law: Judicial and Non-Judicial Punishment*, 13 NEW ENG. L. REV. 381, 401 (1979).

429. RSFSR CODES, *supra* note 225, at 107-08; V. TEREBILOV, THE SOVIET COURT 142-43 (1986). Article 3 of the Statute on Military Tribunals provided that courts-martial were "guided by

the USSR Constitution, the Fundamental Principles of Legislation of the USSR and the Union Republics on Court Organization in the USSR, the present statute, other USSR legislation, and also Union Republic legislation." BASIC DOCUMENTS, *supra* note 425, at 165.

430. Ginsburgs, *supra* note 399, at 19.

431. *Id.*

432. Article 3 of the Statute on Military Tribunals provided that courts-martial were "guided by the USSR Constitution, the Fundamental Principles of Legislation of the USSR and the Union Republics on Court Organization in the USSR, the present statute, other USSR legislation, and also Union Republic legislation." BASIC DOCUMENTS, *supra* note 425, at 165. The civilian courts of the RSFSR had in absentia trial power. THE CODE OF CRIMINAL PROCEDURE OF THE RSFSR arts. 231, 246-47, 257, reprinted in RSFSR CODES, *supra* note 225, at 347, 352, 357.

433. THE TRIAL IN THE CASE OF THE ATROCITIES COMMITTED BY THE GERMAN FASCIST INVADERS IN THE CITY OF KHARKOV AND THE KHARKOV REGION 1 (1943) (translated from the report published in PRAVDA, Dec. 16-20, 1943).

434. *Id.* at 17-18.

435. *Id.* at 18.

436. *Id.* at 6-19.

437. Ginsburgs, *supra* note 399, at 28. Isolated trials may

have been held in Minsk and Riga after their liberation by Soviet forces in 1944. *Id.* at 263.

438. WOETZEL, *supra* note 263, at 220.

439. REACHING JUDGMENT, *supra* note 211, at 230.

440. Ginsburgs, *supra* note 399, at 29; RÜCKERL, *supra* note 396, at 31.

441. See THE ISSUES IN THE BERLIN-GERMAN CRISIS (Background Papers and Proceedings of the First Hammarskjöld Forum, organized by the N.Y. City Bar Association, 1962) (discusses the Berlin Crisis).

442. *Soviet Condemns Three*, THE N.Y. TIMES, Jan. 21, 1962, at 16, col. 6.

443. *Id.*

444. See *Soviet Renews Demand*, THE N.Y. TIMES, Feb. 22, 1962, at 3, col. 3; Manuel R. Garcia-Mora, *War Crimes And The Principle Of Non-Extradition Of Political Offenders*, 9 WAYNE L. REV. 269, 289 (1963). Linnas was later stripped of his U.S. citizenship and deported to the Soviet Union. See *Linnas v. I.N.S.*, 790 F.2d 1024 (2nd Cir. 1986).

445. *Anti-Red Lithuanian Condemned By Soviet*, THE N.Y. TIMES, Jun. 20, at 2, col. 2.

446. See *id.*

447. HISTORY OF THE UNWCC, *supra* note 318, at 471.

448. *Id.*

449. RÜCKERL, *supra* note 396, at 31.

450. HISTORY OF THE UNWCC, *supra* note 318, at 523-28, 531-540.

451. *Id.* at 525, 529.

452. THE TRIAL OF DRAGOLJUB-DRAZA MIHAILOVIC 7 (transcript of proceedings, Belgrade, 1946)[hereinafter TRIAL OF MIHAILOVIC].

453. Mihailovic was recognized as the head of the Yugoslavian resistance by the British in 1941, and the government-in-exile promoted him to commander-in-chief of the resistance forces in 1942. YUGOSLAVIA, *supra* note 4, at 39. His strategy appears to have consisted primarily of avoiding large-scale clashes with the occupying Axis troops while awaiting an Allied invasion, and fighting the communist-led Partisans. *Id.* at 39-40.

454. TRIAL OF MIHAILOVIC, *supra* note 452, at 17-60.

455. The name "Chetnik" is "derived from the Serbian word for detachment," and was given to the "several Serbian resistance groups in World War II organized to oppose occupying Nazis and Croatian collaborators." YUGOSLAVIA, *supra* note 4, at 321.

456. TRIAL OF MIHAILOVIC, *supra* note 452, at 63, 101.

457. *Id.* at 8.

458. *Id.* at 9. The proceedings were occasionally interrupted by spectators shouting slogans like "Death to the traitors!" *Id.* at 205. After the sentences were pronounced,

"there was enthusiastic applause, and shouts of 'Long live the People's Court!'" *Id.* at 552.

459. *See, e.g., id.* at 312.

460. *See, e.g., id.* at 400-01.

461. *See, e.g., id.* at 166.

462. *See id.* at 504.

463. *Id.* at 539-40. Circumstantial information suggests that Yugoslavia did not engage in an extensive in absentia trial program as did the French. In 1951, Yugoslavia filed a formal request to have Andrija Artukovic extradited to Yugoslavia to stand trial for war crimes (mass murders). *Karadzole v. Artukovic*, 247 F.2d 198, 199 (9th Cir. 1957). The Ninth Circuit Court of Appeals affirmed the lower court's granting of Artukovic's habeas corpus petition, finding that the offenses with which he was charged were political in nature and therefore excluded under the applicable extradition treaty between the U.S. and Yugoslavia. *Id.* at 205. The U.S. Supreme Court vacated the decision, 355 U.S. 393 (1958), and on remand the district court upheld the administrative denial of the extradition request. 170 F.Supp. 383 (S.D. Cal. 1959). In 1984, Yugoslavia again sought Artukovic's extradition, based on an arrest warrant to stand trial. *Matter Of Extradition Of Artukovic*, 628 F.Supp. 1370, 1372 (C.D. Cal. 1986). Artukovic's habeas corpus petition was denied this time. *Id.* at 1378.

464. Cathy Moore, *Obstacles to prosecuting rapists as war criminals*, THE IRISH TIMES (Dublin), Apr. 17, 1993, Foreign News Section, at 6 (NEXIS). The other trial to which Ms. Hampson alludes may be that of Cardinal Aloysius Stepanic in the summer of 1946. Cardinal Stepanic was the spiritual leader of the Croat people during World War II, and was involved in the mass forcible conversion of Orthodox Serbs to Catholicism under the auspices of the pro-Axis Ustaschi regime of Ante Pavelic. OTTO KIRCHHEIMER, POLITICAL JUSTICE 99 (1961). The genocidal practices of the Ustaschi triggered similarly violent Chetnik responses, and of the almost 1,700,000 Yugoslavian deaths during the war, approximately one million were caused by other Yugoslavians. YUGOSLAVIA, *supra* note 4, at 42.

465. Note, *The Laws of War and The Angolan Trial of Mercenaries: Death to the Dogs of War*, 9 CASE W. RES. J. INT'L L. 323, 324 (1977).

466. *Id.*

467. *Id.* at 323.

468. *Id.* at 327.

469. *Id.* at 323, 328.

470. LAW CONSTITUTING THE PEOPLE'S REVOLUTIONARY COURT art. 28 (1976) provided that "[a]n absent defendant will be tried in absentia and the presiding judge will designate an official defense counsel for him," reprinted in *id.* at 253.

471. B.N. MEHRISH, *WAR CRIMES AND GENOCIDE, THE TRIAL OF PAKISTANI WAR CRIMINALS* 140 (1972).

472. Approximately three million were killed. Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 *VAN. J. INT'L L.* 1, 2 n.3 (1978) [hereinafter Paust]. Other atrocities included the systematic detainment and rape of Bengali women and girls, mass robbery, and widespread arson. MEHRISH, *supra* note 471, at 106, 111-37.

473. Paust, *supra* note 472, at 5.

474. *Id.*

475. MEHRISH, *supra* note 451, at 110.

476. *Id.* at 110.

477. *Id.* at 3.

478. The International Crimes (Tribunals) Act of July 19, 1973, cited in Paust, *supra* note 472, at 5. It is unknown whether this legislation provided for in absentia trials.

479. *Id.* at 5.

480. *Id.* at 35.

481. *Id.* at 37. Bangladesh did conduct trials of collaborators, however, and at least one was sentenced to death. MEHRISH, *supra* note 471, at 168.

482. Michael Adler, *Seven more people sentenced to death in Kuwait*, *AGENCE FRANCE PRESSE*, Jun. 15, 1991 (NEXIS) [hereinafter

Adler]; Neil MacFarquhar, *Kuwait Court Orders Six Newspaper Workers Hanged*, A.P., Jun. 15, 1991 (NEXIS) [hereinafter MacFarquhar].

483. Adler, *supra* note 481.

484. *Id.*

485. *Id.*

486. *Id.*

487. MacFarquhar, *supra* note 481.

488. *Human Rights Minister on Pitfalls of UN Resolution on War Crimes Tribunal*, BBC, Feb. 25, 1993, Part 2, Eastern Europe; C.1, Special Supplement; EE/1622/C1 (NEXIS).

489. David Crary, *Two Serb Soldiers Sentenced to Face Firing Squad for War Crimes*, A.P., Mar. 30, 1993 (NEXIS).

490. *Id.*

491. *Id.*

492. *Id.*

493. David Ottaway, *Bosnia Convicts Two Serbs In War Crimes Trials*, THE WASHINGTON POST, Mar. 31, 1993, at A21 (NEXIS). A flavor of the trial can perhaps be gleaned from Damjanovic's final statement to the court. He sarcastically thanked the court for its judgment, and stated, "This is not a fair judgment. I am not guilty. I'd also like to have some cigarettes." Crary, *supra* note 477.

494. *Three defendants condemned in absentia for war crimes in Varazdin*, BBC, Mar. 18, 1993, Part 2, Eastern Europe, C.1, Special Supplement; Security Reports: In Brief; EE/1640/C1 (NEXIS).

495. *Id.*

496. *Id.*

497. *See supra* text accompanying notes 235-38.

498. *See supra* text accompanying note 258.

499. *See supra* text accompanying note 261-68.

500. *See supra* text accompanying notes 314-15.

501. *See supra* text accompanying note 399.

502. *See, e.g., Powell v. Alabama*, 287 U.S. 45 (1932) (African-American defendants charged with rape denied the right to counsel and convicted after one-day trials); Graham Boynton, *London Burning*, VANITY FAIR, Jan. 1994, at 112-15, 125-27 (describing the history of the legal case of eleven people wrongfully accused and convicted of being the Irish Republican Army terrorists responsible for the bombing of three English pubs in 1974).

503. *See, e.g., ESMEIN, supra* note 144, at 446 (describing the judicial excesses of the Revolutionary Era French courts); INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (describing the impact of Nazi policy and ideology upon the German courts).

504. See, e.g., THE TOKYO WAR CRIMES TRIAL (C. Hosoya, et al., eds., 1986); LORD HANKEY, POLITICS, TRIALS AND ERRORS (1950) (criticizes Nürnberg trials). The corollary to the concerns over politicization of the in absentia process is that political considerations and post-conflict realities often prevent any judicial accounting for war crimes from occurring in cases in which the presence of the defendant is necessary before a trial can even begin. See Paust, *supra* note 472, at 35.

505. See 1 FERENCZ, *supra* note 219, at 25-54.

506. *Id.*

507. See THE INTERNATIONAL LAW ASSOCIATION, PROPOSAL FOR AN INTERNATIONAL CRIMINAL COURT, INCLUDING STATUTE FOR THE COURT art. 33, *reprinted in id.* at 267.

508. See Convention for the Creation of an International Court, November 16, 1937 art. 27, *reprinted in id.* at 393 ("The Court may not entertain charges against any person except the person committed to it for trial . . .").

509. Draft Convention art. 33, *reprinted in id.* at 407.

510. UNWCC Draft Convention art. 15(4), *reprinted in id.* at 431.

511. ICCPR art. 14(2), *supra* note 77; European Convention

for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(2) 213 U.N.T.S. 221 [hereinafter Eur. Conv.].

512. American Convention on Human Rights arts. 8(1), 12, Nov. 22, 1969, Treaty Series No. 36, OAS Off.Rec. OEA/Ser. A/16 [hereinafter Am. Conv.]; ICCPR art. 14, *supra* note 77; Eur. Conv. art. 6(1), *supra* note 511.

513. Am. Conv. art. 8(2), (3), *supra* note 512; ICCPR art. 14(3), *supra* note 77; Eur. Conv. art. 6(3), *supra* note 511; Geneva Convention on Prisoners of War arts. 104, 105(5), Aug. 12, 1949, 47 Stat. 2021, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter GCPW].

514. Am. Conv. art. 8(2), *supra* note 512; ICCPR art. 14(7), *supra* note 77; Eur. Conv. art. 6(7), *supra* note 511; GCPW art. 105(3), *supra* note 513.

515. Am. Conv. art. 8(5), (6), *supra* note 512; ICCPR art. 14(5), *supra* note 77; Eur. Conv. art. 6(5), *supra* note 511; GCPW art. 105(1), *supra* note 513.

516. Am. Conv. art. 8(7), *supra* note 512; ICCPR art. 14(6), *supra* note 77; Eur. Conv. art. 6(6), *supra* note 511; GCPW art. 105(2), *supra* note 513.

517. Am. Conv. art. 8(8), *supra* note 512; ICCPR art. 14(8), *supra* note 77.

518. Am. Conv. art. 8(9), *supra* note 512; ICCPR art. 14(8), *supra* note 77; GCPW art. 106, *supra* note 513.

519. Am. Conv. art. 8(11), *supra* note 512; ICCPR art. 14(10), *supra* note 77; GCPW art. 105(4), *supra* note 513.

520. Am. Conv. art. 8(4), *supra* note 512; Eur. Conv. art. 6(4), *supra* note 511; GCPW art. 105(4), *supra* note 513.

521. Am. Conv. art. 8(5), *supra* note 512; ICCPR art. 14(5), *supra* note 77; Eur. Conv. art. 6(5), *supra* note 511. Although the GCPW does not specifically state that prisoners of war will be entitled to be present at their own trials, any defendant under this convention is most likely in custody already.

522. See *supra* text accompanying notes 87-89, 128, 130, 187-90, 203.

523. ECIVCJ, May 28, 1970, E.T.S. No. 70, reprinted in 2 INTERNATIONAL CRIMINAL LAW, PROCEDURE 221 (M. Cherif Bassiouni, ed. 1986).

524. ECIVCJ art. 21(2), *id.* at 226.

525. ECIVCJ art. 22, *id.*

526. ECIVCJ arts. 23, 24(2), 29, *id.* at 226, 227.

527. ECIVCJ art. 24(1), *id.* at 226.

528. ECIVCJ arts. 25(1), 26(2), *id.* at 226-27.

529. *Id.* "Any step with a view to proceedings or a preliminary enquiry, taken in the sentencing state in accordance with its law and regulations, shall have the same validity in the requested state as if it had been taken by the authorities of that state, provided that assimilation does not give such steps a

greater evidential weight than they have in the requesting state." ECIVCJ art. 26(4), *id.*

530. ECIVCJ arts. 25(2), 26(2), *id.* at 227.

531. *Id.*

532. *Id.*

533. ECIVCJ art. 26(3), *id.*

534. An in absentia judgment is specifically defined as "any judgment rendered by a court in a Contracting State after criminal proceedings at the hearing of which the sentenced person was not personally present." ECIVCJ art. 21(2), *id.* at 226.

535. ECIVCJ arts. 25(1), 26(1), *id.* at 226-27.

536. As of 1992, Austria, Cyprus, Denmark, the Netherlands, Norway, Sweden, and Turkey were parties to the convention. Belgium, Greece, Iceland, Italy, Luxembourg, Portugal, and Spain were signatories as of 1992. M.J. BOWAN & D.J. HARRIS, MULTILATERAL TTREATIES, INDEX AND CURRENT STATUS 337-38 (1984); *id.*, CULMATIVE SUPPLEMENT 193 (1992).

537. ILC Draft, reprinted in 33 I.L.M. 253 (1994).

538. ILC Draft art. 44(1)(h), *id.* at 281.

539. ILC Draft art. 44 Commentary, ¶ 3, *id.* at 282.

540. ILC Draft art. 44 Commentary, ¶ 4, *id.*

541. Compare *supra* text accompanying notes 511-21, with the

rights of defendants under the Statute of the International Tribunal, *supra* text accompanying notes 35-43.